(1)

No. 99-5746-CFH Title: Lonnie Weeks, Jr., Petitioner
v.
CAPITAL CASE Ronald J. Angelone, Director, Virginia Department of Corrections

Docketed:
August 16, 1999 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Aug 16 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 15, 1999)
	Aug 16 1999	Application (99A151) for a stay of execution of sentence of death, submitted to The Chief Justice.
	Aug 24 1999	Brief of respondent Ronald J. Angelone, Director in opposition filed.
	Aug 25 1999	Reply brief of petitioner Lonnie Weeks filed.
	Sep 1 1999	Application (99A151) referred to the Court by the Chief Justice.
	Sep 1 1999	Application (99A151) granted by the Court.
	Sep 1 1999	Petition GRANTED. The motion for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. SET FOR ARGUMENT December 6, 1999. **********
	Sep 21 1999	Motion of petitioner for appointment of counsel filed.
	Sep 21 1999	DISTRIBUTED. September 27, 1999 (page 111)
	Oct 4 1999	Motion for appointment of counsel GRANTED and it is ordered that Timothy M. Richardson, Esquire, of Virginia Beach, Virginia, is appointed to serve as counsel for the petitioner in this case.
	Oct 13 1999	Record filed.
	Oct 13 1999	Brief of petitioner Lonnie Weeks, Jr. filed.
	Oct 13 1999	Joint appendix filed.
	Oct 14 1999	Record filed.
	Nov 15 1999	Brief of respondent Ronald Angelone, Director in opposition filed.
	Nov 15 1999	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Nov 23 1999	CIRCULATED.
	Nov 29 1999	Reply brief of petitioner Lonnie Weeks filed.
	Dec 6 1999	ARGUED.

No. (2) 99-5746

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

Supreme Court, U.S.
FILED
AUG 16 1999
OFFICE OF THE CLERK

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Imminent Execution Scheduled
September 1, 1999

Sterling H. Weaver, Sr., Esq.
P.O. Box 543
Portsmouth, VA 23705
(757) 393-0237

Counsel for Petitioner

Glen A. Huff, Esq.
Timothy M. Richardson, Esq.
Counsel of Record
Huff, Poole & Mahoney, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
(757) 499-1841

Counsel for Petitioner

45 pp

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

COMES NOW petitioner Lonnie Weeks, Jr., a prisoner currently scheduled to be executed on September 1, 1999, by counsel, and pursuant to Rule 39 of the Rules of the United States Supreme Court, moves the Court for leave to proceed *in forma pauperis*. In support of the Motion Mr. Weeks states as follows:

1. Mr. Weeks has been convicted of capital murder and is scheduled to be executed on September 1, 1999.

2. Mr. Weeks is petitioning the Court to grant a writ of certiorari.

3. Mr. Weeks previously sought leave to proceed *in forma pauperis* in the United States District Court for the Eastern District of Virginia, and he received such leave by Order dated August 15, 1996. A copy of the affidavit Mr. Weeks filed with the District Court is attached hereto as Exhibit A.

4. Thereafter, the United States District Court for the Eastern District of Virginia appointed counsel for Mr. Weeks pursuant to 21 U.S.C. § 848(q)(4)(B) and 28 U.S.C. § 1915 by Order dated September 19, 1996. Pursuant to Rule 39 of the Rules of the Supreme Court, by virtue of this appointment Mr. Weeks need not submit a further affidavit or declaration in support of his Motion.

WHEREFORE, petitioner Lonnie Weeks, Jr., by counsel, prays that the Court grant his Motion for Leave to Proceed *In Forma Pauperis*.

LONNIE WEEKS

Of Counsel

Glen A. Huff, Esq.
Timothy M. Richardson, Esq.
Counsel of Record
Huff, Poole & Mahoney, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
(757) 499-1841

Sterling H. Weaver, Sr., Esq.
Weaver Law Offices
615 Dinwiddie Street
P.O. Box 543
Portsmouth, VA 23705
(757) 393-0237

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

LONNIE WEEKS, JR. Petitioner, v. J.D. NETHERLAND, Warden, Mecklenburg Correctional Center, Boydton, Virginia, Respondent.	)	No. 2:96cv829 /HH POST-CONVICTION PROCEEDING

AFFIDAVIT OF LONNIE WEEKS, JR.

* * * * * * * * * * * * * *

I am Lonnie Weeks, Jr., and this is my affidavit.

1. I am the petitioner in the case of Lonnie Weeks, Jr. v. Netherland, a post-conviction proceeding from a judgment of a state court sentencing me to death, and I believe that I am entitled to redress.

2. I am presently incarcerated at Mecklenburg Correctional Center, Boydton, Virginia. I am not employed.

3. Because of my poverty, I am unable to pay the costs of this case or to give security therefor, and I believe that I am entitled to proceed *in forma pauperis*.

4. In the past twelve months, I have not received any income from businesses, professions, or any other source.

5. My cash assets are $ 0 .

6. I own no real estate, stocks, bonds, automobiles, or other valuable property.

EXHIBIT
A

7. I have no dependents.

8. I understand that a false statement in this affidavit will subject me to penalties for perjury.

Petitioner Lonnie Weeks, Jr.
Mecklenburg Correctional Center
P.O. Box 500
Boydton, Virginia 23917

Sworn and subscribed to before me on 12th day of August, 1996.

My commission expires: Embossed Heron is My Commonwealth of Virginia Notary Public Seal My Commission Expires February 28, 1999 JUDY V. BIGGER

Judy V. Bigger
Notary Public

State Virginia
County - Mecklenburg

99-5146

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

Supreme Court, U.S.
FILED
AUG 16 1999
OFFICE OF THE CLERK

Supreme Court, U.S.
FILED
AL -
CLERK

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Supreme Court, U.S.
FILED
AUG 1o
CLERK

PETITION FOR A WRIT OF CERTIORARI
Imminent Execution Scheduled
September 1, 1999

Sterling H. Weaver, Sr., Esq.
P.O. Box 543
Portsmouth, VA 23705
(757) 393-0237

Counsel for Petitioner

Glen A. Huff, Esq.
Timothy M. Richardson, Esq.
Counsel of Record
Huff, Poole & Mahoney, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
(757) 499-1841

Counsel for Petitioner

RECEIVED
HAND DELIVERED
AUG 16 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Capital Case

QUESTIONS PRESENTED

1. When a capital sentencing jury informs the judge that it does not understand the sentencing instructions held facially constitutional in *Buchanan v. Angelone* and specifically asks whether it is free to consider a sentence less than death if it finds one or more aggravating factors, is the judge constitutionally required to clarify that a death sentence is not mandatory upon the finding of an aggravating factor but that the jury should consider mitigating evidence as well in making its sentencing decision?

2. Did the Fourth Circuit err in holding that it would announce a new rule, in violation of *Teague v. Lane*, if this Court's decisions in *Ake v. Oklahoma*, *Caldwell v. Mississippi*, and *Britt v. North Carolina* were read to require state courts to provide indigent criminal defendants with the assistance of experts in fields other than psychiatry?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

The Crime and the Trial 3
The Direct Appeal 7
Federal Habeas Corpus Proceedings 8

REASONS FOR GRANTING THE WRIT 13

I. The Fourth Circuit's Articulation of the Standard for Responding to Juror Confusion Conflicts with the Decisions of Other Circuits and Cannot Be Reconciled with this Court's Precedents 13

A. The Fourth Circuit's Decision Directly Conflicts with a Recent *En Banc* Decision of the Ninth Circuit and Is Inconsistent with Decisions of the Sixth and Tenth Circuits and the Decisions of the Highest Courts of Several States 14

B. The Fourth Circuit's Decision Cannot Be Reconciled with This Court's Decisions in *Bollenbach*, *Boyde*, and *Buchanan* and Undermines the Eighth Amendment Principles Articulated in *Lockett* and Its Progeny 20

II. The Federal Courts of Appeals Are Deeply Divided on Whether Reading *Ake v. Oklahoma* to Provide Indigent Criminal Defendants with a Right of Access to *Nonpsychiatric* Experts Would Announce a New Rule 22

A. A Federal Court Does Not Create a New Rule When It Applies a General Rule That Was Specifically Designed for the Purpose of Evaluating a Myriad of Factual Contexts 23

B. The Decisions of the Federal Courts of Appeals Are in Conflict 25

C. The Fourth Circuit's Narrow Reading of *Ake* Is Contrary to the Decisions of the Highest Courts of Every State That Has Squarely Addressed the Issue and Fails to Accord Appropriate Deference to the Virginia Supreme Court 29

D. The Right to Nonpsychiatric Experts Comes Within the "Watershed" Exception to the Antiretroactivity Doctrine 32

CONCLUSION 33

TABLE OF AUTHORITIES

CASES

Ake v. Oklahoma, 470 U.S. 68 (1985) 22, 24, 25, 31

Bailey v. State, 424 S.E.2d 503 (S.C. 1992) 30

Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995) 27

Bollenbach v. United States, 362 U.S. 607 (1946) 14, 16, 20

Boyde v. California, 494 U.S. 370 (1990) 15, 20

Bright v. State, 455 S.E.2d 37 (Ga. 1995) 29

Britt v. North Carolina, 404 U.S. 226 (1971) 22

Buchanan v. Angelone, 118 S. Ct. 757 ..... 15, 20

Butler v. McKellar, 494 U.S. 407 (1990) 23

Caldwell v. Mississippi, 472 U.S. 320 (1985) 27, 28, 31

Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986) 26

Davis v. State, 863 S.W.2d 259 (Ark. 1993) 30

Douglas v. California, 372 U.S. 353 (1963) 22

Dubose v. State, 662 So.2d 1189 (Ala. 1995) 29

Dunn v. Roberts, 963 F.2d 308 (10th Cir. 1992) 27

Eddings v. Oklahoma, 455 U.S. 104 (1982) 16, 21, 22

Ex parte Moody, 684 So.2d 114 (Ala. 1996) 29

Francis v. Franklin, 471 U.S. 307 (1985) 13

Gideon v. Wainwright, 372 U.S. 335 (1963) 32

Gilmore v. Taylor, 508 U.S. 333 (1993) 24

Graham v. Collins, 506 U.S. 461 (1993) 32

Gray v. Thompson, 58 F.3d 59 (4th Cir. 1995), *aff'd on other grounds*, 518 U.S. 152 (1996) 25, 28

Green v. Georgia, 442 U.S. 95 (1979) 16

Griffin v. Illinois, 351 U.S. 12 (1956) 22

Harrington v. Beauchamps Enters., 761 P.2d 1022 (Ariz. 1988) 19

Harrison v. State, 635 So.2d 894 (Miss. 1994) 30

Hitchcock v. Dugger, 481 U.S. 393 (1987) 15

Hough v. State, 560 N.E.2d 511 (Ind. 1990) 30

Husske v. Commonwealth, 476 S.E.2d 920 (Va. 1996), *cert. denied*, 519 U.S. 1154 (1997) 31

In re Allen R., 506 A.2d 329 (N.H. 1986) 30

Jackson v. Ylst, 921 F.2d 882 (1990) 25

Leonardo v. People, 728 P.2d 1252 (Colo. 1986) 18, 19

Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987) 25, 26

Lockett v. Ohio, 438 U.S. 586 (1978) 15

McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1575 (1998) 15, 16

McKinley v. Smith, 838 F.2d 1524 (11th Cir. 1988) 27

Mills v. Maryland, 486 U.S. 367 (1988) 16

Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987) 27, 28

O'Dell v. Netherland, 521 U.S. 151 (1997) 31

Penry v. Lynaugh, 492 U.S. 302 (1989) 15, 16, 24

People v. Childs, 636 N.E.2d 534 (Jll. 1994) 19

People v. Lawson, 644 N.E.2d 1172 (Ill. 1994) 29

Polk v. State, 612 So.2d 381 (Miss. 1992) 29

Potter v. United States, 534 A.2d 943 (D.C. 1987) 19

Rey v. State, 897 S.W.2d 333 (Tex. Crim. App. 1995) 30

Rogers v. State, 890 P.2d 959 (Okla. Crim. App. 1995) 30

Ross v. Moffitt, 417 U.S. 600 (1974) 22

Saffle v. Parks, 494 U.S. 484 (1990) 24

Sawyer v. Smith, 497 U.S. 227 (1990) 24

Scott v. Louisiana, 934 F.2d 631 (5th Cir. 1991) 26

Skipper v. South Carolina, 476 U.S. 1 (1986) 16

State v. Bridges, 385 S.E.2d 337 (N.C. 1989) 30

State v. Coffey, 389 S.E.2d 48 (N.C. 1990) 30

State v. Coker, 412 N.W.2d 589 (Iowa 1987) 29

State v. Craig, 637 So.2d 437 (La. 1994) 29

State v. Edwards, 868 S.W.2d 682 (Tenn. Crim. App.1993) 30

State v. Gordius, 544 A.2d 309 (Me. 1988) 30

State v. Stuck, 434 N.W.2d 43 (S.D. 1988) 30

State v. Volker, 477 N.W.2d 909 (Minn. App. 1991) 30

Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988) 27

Tatum v. State 380 S.E.2d 253 (Ga. 1989) 29

Teague v. Lane, 489 U.S. 288 (1989) 23

Terry v. Rees, 985 F.2d 283 (6th Cir. 1993) 26

Thornton v. State, 339 S.E.2d 240 (Ga. 1986) 29

United States v. Bolden, 514 F.2d 1301 (D.C. Cir. 1975) 16

United States v. Brown, 943 F.2d 1246 (10th Cir. 1991) 17, 18

United States v. Combs, 33 F.3d 667 (6th Cir. 1994) 17

United States v. Greschner, 802 F.2d 375, 377 (10th Cir. 1986) 26

United States v. Mann, 161 F.3d 840 (5th Cir. 1998),
cert. denied, 119 S.Ct. 1766 (1999) 14

United States v. Span, 170 F.3d 798 (7th Cir. 1999) 14

United States v. Zimmerman, 943 F.2d 1204 (10th Cir. 1991) 18

Williamson v. Reynolds, 904 F. Supp. 1529 (E.D.Okla. 1995),
aff'd on other grounds sub nom. Williamson v. Ward,
110 F.3d 1508 (10th Cir. 1997) 27, 31

Wright v. West, 505 U.S. 277 (1992) 24

Yohey v. Collins, 985 F.2d 222 (5th Cir. 1993) 26

STATUTES

Va. Code § 19.2-264.4 (Michie 1999 suppl.) 21

28 U.S.C. § 2254(d) (1999 suppl.) 23

MISCELLANEOUS

Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 Psychol. Pub. Pol'y & L. 589 (1997) 13

Peter M. Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev 37 (1993) 13

Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 Buff. L. Rev 339 (1996) 13

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Scheduled
September 1, 1999

Lonnie Weeks, Jr., a Virginia inmate under sentence of death, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the district court's denial of Weeks' petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999), and is reprinted in the accompanying Appendix ("App.") at pages 1 through 26. The opinion of the district court is reported at *Weeks v. Angelone*, 4 F. Supp.2d 497 (E.D. Va. 1998), and is reprinted at pages 27 through 70. The opinion of the Virginia Supreme Court on direct review is reported at *Weeks v. Commonwealth*, 450 S.E.2d 379 (Va. 1994), and is reprinted at pages 71 through 83.

JURISDICTION

The court of appeals issued its judgment and decision on May 10, 1999. Weeks filed a timely petition for rehearing and suggestion for rehearing *en banc* on May 21, 1999. The court of appeals denied the petition for rehearing on June 4, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution, which provide in relevant part as follows:

> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. amend. VIII.
>
> No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

A. The Crime and the Trial

On February 24, 1993, Lonnie Weeks, Jr. was a passenger in a speeding car traveling southbound on Interstate Route 95 in Northern Virginia. A State Trooper pulled the vehicle over on an off-ramp in Prince William County. The Trooper approached and stood near the rear driver's side of the car, and he directed Weeks to get out of the passenger side of the vehicle. After Weeks stepped from the car, he shot the Trooper more than once in rapid succession while standing near the car's front passenger door. The Trooper died as a result of at least one of the gunshot wounds. Weeks was subsequently arrested and charged with the capital murder of a law enforcement officer in the performance of his duties. VA. CODE §18.2-31(6).

Weeks admitted causing the Trooper's death, but he pleaded not guilty to capital murder on the ground that he did not act with premeditation. In support of this theory, and also to support his penalty-phase arguments, Weeks moved the trial court to appoint an independent pathologist and a firearms expert to assist the defense. The trial court denied this motion.[1] The jury returned a verdict of guilty of capital murder.

---

[1] The court's stated reason for denying Weeks' motion was that pathologists and firearms experts deal with issues of fact on which experts do not differ, rather than issues of opinion; in the court's view, independent experts appointed to assist the defense therefore would not reach any different conclusion than the prosecution's experts. (Record on Appeal to the United States Court of Appeals for the Fourth Circuit ("R.") at 641- 43.) Weeks notes that regardless of its reasons, the Circuit Court of Prince William County did not grant independent experts in any field — except for mental health experts whose appointment is mandated by statute — in any of the 10,000 felony cases that it processed between 1985 and 1995. Testimony to this effect was presented by Richard Conway, an Assistant Commonwealth's Attorney in Prince William County, on behalf of the Commonwealth in *Smith v. Angelone*, No. 93CV710 (E.D. Va. Nov. 8, 1995). Weeks has lodged a copy the transcript of Conway's testimony with the Court.

In the penalty phase, Weeks presented evidence in mitigation. In addition to his own testimony, Weeks offered testimony from family, church members, and friends regarding his personal history and character. After presenting this evidence, Weeks proffered instruction C1 and asked that the jury be instructed, in addition to Virginia's pattern capital sentencing instruction, as follows:

> Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the Defendant to life in prison.

(App. at 85.) The trial court denied the instruction. (R. at 1254-55.) Instead, the court provided the jury with four brief instructions regarding their duties in assessing Weeks' sentence. (App. at 86-89.) Only one of those instructions, Instruction #2, described the process by which jurors were to arrive at a sentence selection determination. That pattern instruction, which this Court found to be facially constitutional in *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), reads, in pertinent part, as follows:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death; or, if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment, or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.

(App. at 87.)

This instruction correctly shows that Virginia is a nonweighing state in which the sentencer must make two independent determinations — death eligibility and sentence selection — in sequence:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal

> acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim [*death eligibility decision*]; and (2) recommend that the penalty of death be imposed [*sentence selection decision*].

VA. CODE § 19.2-264.2. The pattern instruction also reflects the fact that Virginia juries are constitutionally required to consider mitigating evidence in making each of these determinations. *See, e.g., Tuggle v. Netherland*, 516 U.S. 10, 14 (1995) (per curiam) (holding that trial court's failure to appoint psychiatrist to develop mental health mitigating evidence deprived Virginia defendant not only of ability to rebut state's evidence of future dangerousness, but also "may well have affected the jury's ultimate decision, based on all of the evidence before it, to sentence petitioner to death rather than life imprisonment").

Weeks' jury was given a written copy of the instructions as well as the verdict form to take with them and consult during deliberations.

Eighty minutes after the jury retired to deliberate on Weeks' sentence, it sent out a written question asking whether a sentence of life imprisonment would include the possibility of parole. (R. at 1340.) The trial court refused to answer this question, instead advising the jury that it should "impose such punishment as you feel is just under the evidence, and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." (App. at 90; R. at 1340.) The jury returned to its deliberations.

After almost three more hours of deliberation, the jury sent out a second written question expressing confusion about the sentencing instruction:

> If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the aggravating alternatives, then is it our duty as a jury to issue the death penalty? or must we decide (even though he is guilty of 1 of the alternatives) whether or not to issue the

death penalty, or one of the life sentences? What is the rule? Please clarify.

(App. at 91; R. at 1342 (emphases in original.) This question indicates that some of the jurors harbored as many as three misconceptions about the capital sentencing instruction: (i) that they had a duty to sentence the defendant to death as soon as they found him eligible for death; (ii) that the evidence they heard about Weeks' background and character was relevant only to the determination of death eligibility based on future dangerousness — an aggravating factor that they did not find; and/or (iii) that because they had a duty to impose death after they found that the crime was vile, there was no need to engage in sentence selection and to consider whether the mitigating evidence might counsel in favor of a life sentence.

Although pattern instruction #2 presented a simple decisional tree that ordinary jurors ought to be able to follow, the jurors in Weeks' case exhibited clear lack of understanding about whether they were duty-bound to issue the death penalty once they determined that Weeks was eligible for death or, instead, whether they were supposed to go on to consider all of the evidence (including the mitigating evidence) and to select the appropriate punishment from among all of the sentencing options.

At this point, Weeks' trial counsel renewed his request that the jury be given proposed instruction C1, which said in simple and straightforward language that the jurors could impose a life sentence even if they found an aggravating factor. (R. at 1344.) The trial court denied this request. The court also refused to give the jurors any further concrete guidance or clarification of the rule. Instead, the trial judge wrote on the bottom of the jury's inquiry: "see second paragraph of instruction #2, (Beginning with 'If you find from . . .')." (App. at 91.) The jury then returned to its deliberations.

A little over two hours after expressing its confusion over the sentencing instruction, the jury fixed Weeks' sentence at death based on the sole aggravating factor that the crime was outrageously or wantonly vile, horrible or inhuman. (R. at 1346.) The transcript records that "a majority of the jury members [were] in tears" as they delivered their sentence. (R. at 1346.)

B. <u>The Direct Appeal</u>

Weeks alleged on appeal that the trial court's refusal to appoint necessary experts to assist an indigent defendant violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. As the United States Court of Appeals for the Fourth Circuit later agreed, Weeks properly presented this issue; the Virginia Supreme Court simply failed to address it. (App. at 14.) *See Smith v. Digmon*, 434 U.S. 332 (1978) (per curiam) (claim is ripe for federal collateral review even if "state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court").

Weeks also alleged on direct appeal that his rights under the Eighth and Fourteenth Amendments were violated by the trial court's refusal to clarify the capital sentencing instruction after the court received a specific jury request to decipher the rule of law. Weeks argued that as a result of this error, there was a reasonable probability that the jury did not engage in the sentence selection process and therefore did not have an opportunity to consider relevant mitigating evidence in determining the appropriate punishment. Without any discussion of the pertinent facts or the governing law, the Virginia Supreme Court dismissed this claim as having "no merit." Following the state court's affirmance of the conviction and death sentence, *Weeks v. Commonwealth*, 450 S.E.2d 379, 383, 390 (Va. 1994), this Court denied certiorari, *Weeks v. Virginia*, 516 U.S. 829 (1995).

C. Federal Habeas Corpus Proceedings

After exhausting state remedies, Weeks filed his federal habeas petition on February 7, 1997. In that petition Weeks renewed his claim that the trial court violated his Eighth and Fourteenth Amendment rights by refusing to appoint an independent pathologist and firearms expert. The court of appeals concluded correctly that this claim is not subject to deferential review under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), because the claim "was [not] adjudicated on the merits in state court proceedings." (App. at 14.) The appellate court held, however, that for a habeas court to recognize any constitutional right to such experts for indigent defendants would violate the antiretroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989). (App. at 17-18.) The court of appeals gave two reasons.

First, it held that the right to expert assistance articulated in *Ake v. Oklahoma*, 470 U.S. 68 (1985), was narrowly limited to the appointment of a psychiatrist when an indigent defendant "demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." (App. at 79 (*quoting Ake*, 470 U.S. at 83.)) The court of appeals acknowledged that the government, on request, must provide indigent criminal defendants with the "basic tools of an adequate defense," *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) but held that neither *Britt* or *Ake* compelled the state to provide the assistance of any kind of expert other than a psychiatrist. (App. at 16-17.)

Second, the court of appeals rejected Weeks' assertion that the state court would have recognized a federal constitutional right to a pathologist and a firearms expert if the state court had addressed this issue when Weeks presented it on direct appeal. (App. at 17-18.) Weeks' argument was based on the fact that one year after his direct appeal, the Virginia Supreme Court *did* address

this issue. In *Husske v. Commonwealth*, 476 S.E.2d 920 (Va.1996), *cert. denied*, 519 U.S. 1154 (1997), an indigent defendant alleged that the trial court had violated his Eighth and Fourteenth Amendment rights by refusing to grant his motion for an independent DNA expert. The state court held that:

> *Ake* [*v. Oklahoma*, 470 U.S. 68 (1985),] and *Caldwell* [*v. Mississippi*, 472 U.S. 320 (1985)], when read together, require that the Commonwealth of Virginia, upon request, provide indigent defendants with "the basic tools of an adequate defense," *Ake*, 470 U.S. at 77, and, that in certain instances, these tools may include the appointment of non-psychiatric experts.

Husske, 476 S.E.2d at 925 (Va. 1996).

Before the Virginia Supreme Court reached the decision in *Husske*, the court surveyed the decisions of other courts, both state and federal, and concluded that "most courts which have considered the question . . . have held that the Due Process and Equal Protection clauses require the appointment of non-psychiatric experts to indigent defendants" upon a showing of need. *Id.* The state court further clarified that its decision did not break new ground. Instead, the decision upheld the trial court's denial of experts on prior occasions only because the defendants in those cases "failed to make the requisite particularized showing of the need for the requested expert assistance." *Husske*, 476 S.E.2d at 926.

Weeks argued below that although *Husske* was decided a year after his conviction became final, the legal landscape did not change one whit during that interval, and *Husske* was thus a good proxy for what the state court would have concluded if it had addressed the issue when Weeks presented it on direct appeal. *See Lambrix v. Singletary*, 520 U.S. 518, 536-37 (1997) (describing later-decided case as "a particularly good proxy" for what reasonable jurists would have concluded four years previously). The federal court of appeals insisted, however, that even if the Virginia

Supreme Court had been "convinced after canvassing cases from other courts that such experts may be required in certain cases," (App. at 17), the state court had not been *compelled* to reach that decision by existing precedent.[2]

Weeks also renewed in federal court his claim that the trial court had a duty under the Eighth and Fourteenth Amendments to clear up the jury's expressed confusion about the law governing the selection of the appropriate sentence. Weeks argued that even if the pattern jury instruction was unambiguous on its face, the trial court was required under the circumstances to give a clarifying instruction rather than merely telling the jurors to reread the very instruction that was the source of their confusion — especially when the jury had pored over the written instruction for hours before sending out its inquiry. Weeks further argued that the jurors would not have sent out this question unless some of them were genuinely confused about their obligation. *See Simmons v. South Carolina*, 512 U.S. 154, 170 n.10 (1994) (opinion of Blackmun, J.) ("It almost goes without saying that if the jury in this case understood . . . the 'plain meaning' [of the terms in the instruction] there would have been no reason for the jury to inquire [as to their meaning]"); *id.* at 173 (Souter, J., concurring) ("It is . . . clear that at least one of these particular jurors did not understand the meaning of the term, since the jury sent a note to the judge asking [the court to define the term]"); *id.* at 198 (O'Connor, concurring) ("that the jury in this case felt compelled to ask" about the meaning of the terms in the instruction "shows" that the jurors did not understand the term).

The court of appeals denied Weeks' claim, relying upon the holdings and analyses in

---

[2]The federal court of appeals also rejected Weeks' argument that an indigent defendant's right to nonpsychiatric experts comes within the "watershed" exception to the new rule doctrine because it would be fundamentally unfair to conclude that psychiatrists are a basic tool of an adequate defense while nonpsychiatric experts are not. (App. at 18.)

Buchanan v. Angelone, 118 S. Ct. 757 (1998), and *Boyde v. California*, 494 U.S. 370 (1990). First, the court of appeals apparently concluded that because the pattern instruction is unambiguous on its face, "no reasonable juror would have understood the sentencing instruction to preclude the consideration of mitigating evidence even upon a finding of an aggravating factor." (App. at 13.) The Fourth Circuit was untroubled by the jurors' written question indicating that some members of the jury believed they had a "duty" to impose a capital sentence immediately upon finding that Weeks was eligible for death, and that these jurors misconstrued the pattern instruction as precluding them from considering mitigating evidence or imposing a life sentence:

> "The instruction did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on "all the evidence," the instruction afforded jurors an opportunity to consider mitigating evidence. The [pattern] instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they 'may fix' the penalty at death, but directed that if they believed that all the evidence justified a lesser sentence then they 'shall' impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved."

(App. at 12 (quoting *Buchanan*, 118 S. Ct. at 762.))

The court of appeals further reasoned that because Weeks, like Buchanan, had presented evidence about his background and character, the jury must have known that it was required to consider this evidence *after* it concluded that Weeks was eligible for death. "[W]e think it unlikely that reasonable jurors would believe the court's instructions transformed all of this favorable testimony into a virtual charade." (App. at 13 (quoting *Boyde*, 494 U.S. at 383 (internal quotation marks omitted)).[3] Lastly, the court of appeals noted that on the preprinted verdict form, the jurors

---

[3]The jury may well have thought that the evidence about Weeks' background and character was offered only to rebut future dangerousness — an aggravating factor that the state sought but the jury did not find. This unconstitutionally limited view of the function of mitigating evidence

indicated that they had sentenced Weeks to death after considering mitigating evidence.[4] (App. at 13.)

The court of appeals affirmed the denial of the writ on May 10, 1999. Weeks timely moved for rehearing, which the court denied on June 4, 1999. On July 7, 1999, the Circuit Court of Prince William County issued an order that Weeks be executed on September 1, 1999.

in Virginia's capital sentencing scheme would be consistent with the notion expressed in the jurors' question that if they found Weeks eligible for death because the crime was vile, there was nothing left for them to do but to impose the death sentence.

[4]By statute, *every* sentencing option on the preprinted verdict form must indicate that the jurors have considered evidence in mitigation of the offense. VIRGINIA CODE § 19.2-264.4(B). Thus, Weeks' jury had no choice but to indicate that it considered mitigating evidence, regardless whether this was true. Moreover, if the jurors viewed the evidence of Weeks' background and character as relevant solely to the rebuttal of future dangerousness, they could truthfully state that they considered the mitigating evidence — even if they did not engage in the required sentence selection process.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S ARTICULATION OF THE STANDARD FOR RESPONDING TO JUROR CONFUSION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENTS

It is axiomatic that real jurors do not all think like hypothetical jurors. *See Francis v. Franklin*, 471 U.S. 307, 342 (1985) (Rehnquist, J., dissenting) (distinguishing between understandings of hypothetical jurors and real jurors). Thus, even when a particular jury instruction is facially unambiguous — meaning that there is no reasonable likelihood a hypothetical juror would apply the instruction in an unconstitutional manner — real jurors in an individual case may find the instruction incomprehensible and ask the trial court for clarification.

Jury misunderstanding, even of technically flawless pattern instructions, is alarmingly common.[5] In light of the frequency with which jurors misunderstand facially unambiguous instructions, Weeks' case presents an issue of special and recurring importance to the administration of justice.

How should trial courts respond when jurors ask for clarification of an instruction that ought to be perfectly clear? In Weeks' case, the Fourth Circuit held that when the jury requests

[5]*See, e.g.*, Peter M. Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev 37 (1993) (reviewing studies showing that many jurors fail to comprehend technically flawless instructions); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 Psychol. Pub. Pol'y & L. 589, 596-97, 613-16 (1997) (noting that jurors have difficulty comprehending facially unambiguous instructions 30 percent of the time and that lack of comprehension is even higher for death penalty instructions); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 Buff. L. Rev 339, 360 (1996) (reporting that in spite of instructions, nearly one-third of jurors in capital cases were under mistaken impression that law required them to impose death sentence if they found an aggravating factor).

clarification of a facially unambiguous instruction, the appropriate response is simply to refer the jurors back to that instruction. (App. at 13.) The court of appeals reasoned that if an instruction is unambiguous on its face, jurors simply will not misunderstand it, notwithstanding their written professions of confusion. (App. at 12-13.) The Sixth, Ninth, and Tenth Circuits disagree. When jurors send out a question that expresses an inability to understand a technically flawless instruction, these courts take the jurors at their word and require the trial judge to clear away the jury's confusion "with concrete accuracy," *Bollenbach v. United States*, 362 U.S. 607, 612-13 (1946), just as if the instruction was defective on its face. Other courts take a case-by-case approach, taking into consideration factors such as the nature of the question, the complexity of the original instructions, and the jurors' ability to review the instruction during their deliberations.[6]

Because lay jurors frequently misunderstand clear instructions, this is a recurring problem of constitutional dimension, and this Court should grant certiorari to resolve the correct standard.

A. The Fourth Circuit's Decision Directly Conflicts with a Recent *En Banc* Decision of the Ninth Circuit and Is Inconsistent with Decisions of the Sixth and Tenth Circuits and the Decisions of the Highest Courts of Several States

The Fourth Circuit, like the trial court, undertook no analysis of the jurors' question. (App. at 12-13.) Rather, the Fourth Circuit concluded that when an instruction is complete, accurate, and unambiguous, the trial court *per se* acts appropriately when it answers the jurors' query simply by

[6]Factors that courts have taken into consideration in deciding whether or not it is sufficient just to reread the original instructions include whether the jurors already had received a written copy of the instructions to consult during deliberations, *see, e.g., United States v. Span*, 170 F.3d 798 (7th Cir. 1999); whether the jurors' question indicated that they had gotten sidetracked by an extraneous issue, *see, e.g., United States v. Mann*, 161 F.3d 840, 863 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1766 (1999); and whether the original instructions were so long and complex that the jurors may have failed to focus on the portion of the instructions that answered their question.

referring them back to that instruction. Applying principles of ratiocination, the court of appeals held that there was no reasonable likelihood that a hypothetical jury would apply the original instruction in an unconstitutional manner; ergo, there was no reasonable likelihood that the jurors in Weeks' case applied the instruction in an unconstitutional manner. (App. at 13.)

In a strikingly similar case, the *en banc* Ninth Circuit reached the diametrically opposite conclusion. *See McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 1575 (1998). McDowell, like Weeks, was a capital defendant. McDowell, like Weeks, presented mitigating evidence at the penalty phase of his capital trial. McDowell's jury, like Weeks' jury, was given technically flawless instructions regarding the process for determining whether the defendant should be sentenced to death.[7] During the penalty phase deliberations, McDowell's jury, like Weeks' jury, sent out a note revealing confusion and disagreement about whether it was permitted to consider the mitigating evidence presented by the defense. *Id.* at 835. McDowell's trial court, like Weeks' trial court, did not directly answer the jurors' questions; it merely referred the jurors back to the original instructions.

In federal habeas proceedings, the *en banc* court in *McDowell* acknowledged this Court's consistent refusal to tolerate any barrier to the sentencer's consideration of mitigating evidence, regardless whether that barrier is interposed by statute, *Lockett v. Ohio*, 438 U.S. 586(1978); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); by jury instructions, *Penry v. Lynaugh*, 492 U.S. 302,

[7]McDowell did not raise a facial objection to the instruction in his case, which was the same instruction that this Court approved in *Boyde v. California*, 494 U.S. 370 (1990). Weeks *did* make a facial objection to the sentencing instruction in his case, but he did not pursue that error after this Court approved the identical instruction in *Buchanan v. Angelone*, 118 S. Ct. 757 (1998).

319 (1989); *Mills v. Maryland*, 486 U.S. 367 (1988); by an evidentiary ruling, *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Green v. Georgia*, 442 U.S. 95, 99 (1979); by prosecutorial argument, *Penry*, 492 U.S. at 326; or by the sentencing court's misunderstanding of a state statute, *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The *McDowell* court then concluded:

> The jury's mistake and confusion in the instant case communicated to the judge in its note fit squarely withing the teaching of *Lockett* and *Eddings*. Although the jurors had been properly instructed, the understanding of eleven of them — shades of *Eddings* — was "as if the trial judge had instructed [them] to disregard the mitigating evidence [McDowell] proffered on his behalf."

Id. at 837 (citations omitted). Calling upon this Court's admonition in *Bollenbach v. United States*, 362 U.S. 607, 612-13 (1946), that when the "jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy," the Ninth Circuit found the trial court's response to the jury's confusion was constitutionally insufficient to dispel the possibility that the jury would sentence McDowell to death without considering relevant evidence. *Id.* at 837- 41.

Addressing the trial court's mere referral to the original instructions, the Ninth Circuit reasoned that when a jury has failed to understand the instructions in the first instance, "it would be folly to presume . . . that in the end they got it right and followed the law." *Id.* at 839. Thus, the failure to correct the jury's obvious misunderstanding of a critical rule of law left a reasonable likelihood that the jury had incorrectly interpreted its instructions so as to preclude consideration of mitigating evidence. *Id.* at 841.

The Sixth and Tenth Circuits agree with the Ninth Circuit.[8] On direct appeal in a noncapital

[8] *See also, United States v. Bolden*, 514 F.2d 1301, 1308 (D.C. Cir. 1975) (pattern instruction "was not meant to be and is not an inflexible directive to be followed by rote"; where jury indicates that it does not understand pattern instruction, court must provide additional instruction).

case, the Sixth Circuit articulated the same general standard as the Ninth Circuit. In *United States v. Combs*, 33 F.3d 667 (6th Cir. 1994), the defendants were charged with kidnaping (count 1) and depriving the victim of his civil rights by kidnaping him (count 4). After the trial court gave the jury instructions that correctly and adequately represented the law, the jurors sent out a note stating, "We need further clarification on Count 4. Is Count 4 specific to which civil right was violated? Must it be dependent on Count 1." In response to the jury's first query, "the court wrote, 'Yes. Please refer to Jury Instructions #25(6) at pages 23-24, and to Count 4 of the Indictment.' In response to the second question, the court simply wrote 'No.'" *Id.* at 668-68.

Addressing the defendants' argument that a trial court, faced with juror confusion, must do more than merely repeat its original instructions, the Sixth Circuit emphasized that when the jury sends out a note indicating confusion over "'an important legal issue,' the district court abuses its discretion by not clarifying the issue." *Id.* at 669 (citing *United States v. Nunez*, 889 F.2d 1564, 1568 (6th Cir. 1989)).

> Upon receipt of questions from a deliberating jury, it is incumbent upon the district court to assume that at least some jurors are harboring confusion, which the original instructions either created or failed to clarify. Therefore, the trial judge must be meticulous in preparing supplemental instructions, taking pains adequately to explain the point that obviously is troubling the jury. To be sure, the court must ensure that, in responding, it does not stray beyond the purpose of jury instructions, but the jury's questions here did not seek collateral or inappropriate advice.

Id. at 670.

The same rule applies in the Tenth Circuit. In *United States v. Brown*, 943 F.2d 1246 (10th Cir. 1991), an associate at a law firm was charged with conspiring to defraud the United States by

concealing the financial transactions of two of the firm's clients.[9] After three days of deliberation, the jury sent out a note containing the following questions:

> If a person observes an act that is obviously, to him or her, a crime, (1) does the observer have a legal responsibility to report the crime; (2) does the observer have a legal responsibility to intervene to stop it; (3) does failure to report or otherwise intervene make the observer a participant or in any way responsible?

Id. at 1256. Concluding that "the jury's questions went to the 'heart of the conspiracy concept' and that the jury instructions as a whole adequately addressed the questions posed," *id.*, the trial court declined to give any additional instruction. The court of appeals reversed, holding that because "the jury may have been confused, [it may have] convicted appellant on an improper basis. It was plain error not to resolve or attempt to resolve the jury's confusion." *Id.; see also United States v. Zimmerman*, 943 F.2d 1204 (10th Cir. 1991) (same).

The highest courts of several states similarly follow the rule articulated by the Sixth, Ninth, and Tenth Circuits. In *Leonardo v. People*, 728 P.2d 1252 (Colo. 1986), for example, the jury was instructed that the defendant could be convicted of theft by receiving only if he acted while "knowing or believing" that the thing of value in question had been stolen. The court further gave a pattern definition of the term "knowingly." When the jury sent out a note asking "Is Knowing or Believing in instruction Number 6 The Same as Having a Suspicion of?" the court responded, "You must reach your verdict applying the words as you find them in the instructions." *Id.*

Reversing the intermediate appellate court's affirmance of this conviction, Colorado's highest court explained that although the instructions given by the trial court were clear and correct:

> The issue in this case is not the adequacy of the original instructions given, but rather the jury's demonstrated misunderstanding of those instructions. Absent a contrary showing, it is presumed that the jury understood and heeded the trial court's instructions. This presumption, however, is rebuttable. Where, as here, a jury affirmatively indicates that it has a fundamental misunderstanding of an instruction it has been given, the basis for a presumption that the jury understands the instruction disappears. . . .
>
> The People argue, and the majority in the court of appeals apparently agreed, that the trial judge's failure to answer the jury's question was appropriate since the jury could be adequately informed by directing their attention to the original instructions. . . . However, [the jury's question] . . . demonstrates that the jury had considered the relevant instruction on mental state but did not know if suspicion was encompassed within the culpable mental state described in that instruction. Referring the jury back to the same instruction that created the doubt in their minds could serve no useful purpose.

Id. at 1255 (internal quotations and citations omitted). *See also People v. Childs*, 636 N.E.2d 534, 540-41 (Ill. 1994) (even if original instruction was proper, it must not have been understood or jury would not have asked question; therefore, court erred in merely directing jury to reread instruction); *Harrington v. Beauchamps Enters.*, 761 P.2d 1022, 1025 (Ariz. 1988) (*en banc*) ("there are situations when a question from a jury so clearly demonstrates confusion on the jury's behalf that additional instructions are necessary, even though the original instructions were complete and clear"); *Potter v. United States*, 534 A.2d 943, 945-46 (D.C. 1987) (although court gave correct instruction on self-defense and counsel informed jury in closing argument that it could consider self-defense as to each count, it was reversible error for court not to answer jury's inquiry as to whether it could consider self-defense as to second count).

Because juries fail to understand straightforward instructions with alarming frequency, and because the Fourth Circuit's *per se* rule conflicts with the rule in other circuits and with the rule in the highest courts of several states, this Court should grant certiorari to decide the correct response to explicit juror misunderstanding on governing points of law.

---

[9]The law firm, certain of its members, and the firm's clients also were charged with this conspiracy.

B. The Fourth Circuit's Decision Cannot Be Reconciled with This Court's Decisions in *Bollenbach*, *Boyde*, and *Buchanan* and Undermines the Eighth Amendment Principles Articulated in *Lockett* and its Progeny

The rule for more than half a century has been that when a jury instruction is facially defective and the "jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 362 U.S. 607, 612-13 (1946). There is no principled reason for applying a different rule when the jury makes explicit its inability to comprehend an instruction that lawyers and judges deem to be unambiguous. Jurors, after all, "do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Boyde*, 494 U.S. at 380-81. If the jurors don't get it, they don't get it — regardless how clear the instruction may appear to trained legal minds or even to different jurors. The Virginia Supreme Court's decision was contrary to and an unreasonable application of this Court's clearly established precedents, and the Fourth Circuit erred in upholding the state court's ruling.

This Court's more recent decisions in *Boyde* and *Buchanan* do not dilute the *Bollenbach* principle. *Boyde* and *Buchanan* both involved challenges to jury instructions that allegedly were ambiguous on their face. In neither case did the jurors request clarification or otherwise indicate that they were interpreting the instructions in a manner that precluded the consideration of mitigating evidence. In both cases, therefore, this Court was required to *predict* what reasonable jurors would infer from the language of the instructions and the context of the proceedings. Indeed, this Court indicated that the rule in *Boyde* is predicated on the absence of any overt evidence of jury misunderstanding. *See Buchanan*, 118 S. Ct. at 763 (finding no reasonable likelihood "in this context" that jury would misunderstand Virginia's pattern instruction).

Weeks' case, in contrast, did not require any court to speculate about the possibility that jurors might misunderstand the capital sentencing instruction. Weeks' jury explicitly told the trial court that some of them thought they were required to issue a death sentence as soon as they found Weeks eligible for death, without engaging in the sentence selection process and thus without considering relevant mitigating evidence in determining the appropriate punishment. (App. at 91.) There is no dispute that if even one of the jurors chose the sentence of death in such a fashion, then Weeks' rights under the Eighth and Fourteenth Amendments were violated.[10] The Fourth Circuit's insistence on disregarding the evidence of actual misunderstanding expressed in the jurors' note, and considering only what "reasonable jurors" would infer, is contrary to *Bollenbach* and unsupported by *Boyde* or *Buchanan*.

Moreover, the specific instruction in Weeks' case — as in *Boyde*, *Buchanan*, and *McDowell* — concerns the sentence selection decision in a capital case. Virginia's scheme requires jurors to consider mitigating evidence when they make the ultimate sentencing decision in a capital case. Because of this requirement, there are close parallels between *Weeks* and *Eddings*.

The trial judge in *Eddings*, like the jury in Weeks' case, erroneously believed that in making the sentence selection decision, he could not consider certain mitigating evidence as a matter of law. He put this on the record, just as Weeks' jury did in their note. Under these kinds of circumstances, this Court has declined to assume that the sentencer actually *did* consider the evidence:

> Even though the Petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate

[10]Virginia requires juror unanimity for a death sentence. If one juror does not select death as the appropriate punishment, the trial court must impose a sentence of life imprisonment. VA. CODE § 19.2-264.4 (Michie 1999 suppl.).

> as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors. . . . *Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Eddings, 455 U.S. at 119 (O'Connor, J., concurring). There can be no principled distinction between a judge who misinterprets a *statute* to preclude consideration of mitigating evidence and jurors who misinterpret their *instructions* to preclude the consideration of mitigating evidence. The Court should grant certiorari to reaffirm the clearly established rule in *Bollenbach*, as informed by *Boyde*, *Buchanan*, and *Eddings*.

II. THE FEDERAL COURTS OF APPEALS ARE DEEPLY DIVIDED ON WHETHER READING *AKE V. OKLAHOMA* TO PROVIDE INDIGENT CRIMINAL DEFENDANTS WITH A RIGHT OF ACCESS TO NONPSYCHIATRIC EXPERTS WOULD ANNOUNCE A NEW RULE

This Court long has acknowledged that states must afford indigent criminal defendants with a meaningful opportunity to present a defense. *See, e.g., Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). Although the state need not purchase for an indigent defendant all of the services that the wealthy may buy, *see Ross v. Moffitt*, 417 U.S. 600 (1974), the state must provide the defendant with the "basic tools of an adequate defense." *Britt v. North Carolina*, 404 U.S. 226 (1971).

In *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985), this Court held that a psychiatric expert could constitute such a basic tool when the issue to be addressed by the psychiatrist would be a significant issue at trial or necessary to an adequate defense. Since the decision in *Ake*, the state and federal courts have been divided on whether the rule in that case is narrowly limited to the right to a psychiatrist, or if it also establishes the rule for an indigent defendant's access to other kinds of experts.

In *Weeks*, the Fourth Circuit squarely held that to apply the principles of *Ake* to nonpsychiatric experts would announce a "new rule," and thus that the antiretroactivity doctrine bars federal habeas review of Weeks' federal constitutional claim.[11] (App. at 15-18.) *See Teague v. Lane*, 489 U.S. 288 (1989). The only other court to impose this doctrinal straightjacket on *Ake* is the Ninth Circuit. The position of the Fourth and Ninth Circuits is in direct conflict with several other courts of appeals. The stance of the Fourth and Ninth Circuits also is inconsistent with the position of the highest court in every state that has directly addressed whether *Ake* establishes a federal constitutional right to nonpsychiatric experts. This Court should grant certiorari to resolve the conflict among the courts of appeals, and to provide guidance to the state courts that have not rendered an opinion about the full scope of *Ake*.

A. A Federal Court Does Not Create a New Rule When It Applies a General Rule That Was Specifically Designed for the Purpose of Evaluating a Myriad of Factual Contexts

In *Teague*, a plurality of this Court adopted the second Justice Harlan's retroactivity approach and held that a "new rule" of federal constitutional law will not be applied or announced on collateral review unless the rule falls within one of two narrow exceptions.[12] *See Teague*, 489 U.S. at 299-316

---

[11]Because the new rule doctrine exists to "validate[] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to [other] decisions," *Butler v. McKellar*, 494 U.S. 407, 414 (1990), there is good cause to question the application of the doctrine in the first instance when the defendant presented the issue to the state court on direct review but that court somehow failed to address it. *Cf.*, 28 U.S.C. § 2254(d), as amended by the AEDPA (imposing limitations on federal habeas review only if claim actually "was adjudicated on the merits in State court proceedings").

[12]The first exception is for new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311 (plurality opinion) (internal quotation marks omitted). The second exception is for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

(plurality opinion). The new rule doctrine is predicated on interests of comity and the finality of criminal convictions. *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993). This principle "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. 227, 231 (1990).

The Court has emphasized, however, that when a rule announced in one factual circumstance is designed to apply to diverse factual circumstances, federal courts may safely apply that rule to the kind of new facts that were within the intended scope of the original rule does not announce a new rule. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989) (emphasizing critical distinction between *extension* of existing precedent on collateral review to announce new rule, and mere *application* of existing general principle to new set of facts); *Wright v. West*, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring in the judgment) (when "a rule [is] designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent"); *see also id.* at 304.

In Weeks' view, the decision in *Ake* established precisely this kind of rule. The standard announced in *Ake* was designed for evaluating myriad requests for access to experts, not merely requests for appointment of a psychiatrist. This Court likely did not, and does not, anticipate granting certiorari in dozens (if not hundreds) of cases to decide whether an indigent defendant has a constitutional right to each separate kind of expert.

B. The Decisions of the Federal Courts of Appeals Are in Conflict

The Fourth Circuit has held squarely that *Ake* did not announce a rule for courts to employ in other factual contexts and that the principles enumerated in *Ake* do not apply beyond the narrow and specific facts of *Ake*:

> We interpret *Ake* and *Caldwell* together to stand for the proposition that due process as of the time Weeks's conviction became final only required that an indigent defendant be appointed psychiatric experts when his sanity is at issue in the trial.

(App. at 17.) *See also, Gray v. Thompson*, 58 F.3d 59, 66 (4th Cir. 1995) (indigent defendant has no constitutional right of access to private investigator), *aff'd on other grounds*, 518 U.S. 152 (1996).

The Ninth Circuit shares this narrow reading of *Ake*. In *Jackson v. Ylst*, 921 F.2d 882, 885-86 (1990), the defendant claimed that he had a federal due process right to appointment of an eyewitness identification expert. The Court of Appeals concluded that such a holding "would create a 'new rule' which would 'impose[] new obligation on the [s]tates.' *Teague v. Lane*, 109 S.Ct. at 1070." *Jackson*, 921 F.2d at 886. Like the Fourth Circuit, the Ninth Circuit said that *Ake* should be limited to its factual context — i.e., that due process requires only that "a trial court must appoint a psychiatrist for an indigent if his or her sanity will 'be a significant factor at trial.'" *Id.* at 885 (citation omitted).

The Eighth Circuit has reached the opposite conclusion. In *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987) (*en banc*), a rape victim identified Little as her assailant after she was placed under hypnosis by a police officer. Little, an indigent defendant, requested the state to provide him with an expert in hypnosis so he could intelligently challenge the qualifications of the state's hypnotist and his methodology. The Missouri Supreme Court found no due process error in the denial of the expert, concluding that Little could have challenged the identification procedures by

using the library or by consulting with psychologists from a local university "at little or no expense." *Id.* at 1242 The *en banc* Eighth Circuit, relying upon this Court's decisions in *Britt, Ake*, and *Caldwell,* held that the "rule of *Ake*" applied to nonpsychiatric experts as well as psychiatrists:

> There is no principled way to distinguish between psychiatric and nonpsychiatric experts. The question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given.

Id. at 1243.

The Sixth Circuit likewise concluded that the rule of *Ake* should be applied to requests for nonpsychiatric experts. Relying on this Court's decision in *Ake*, that court concluded in *Terry v. Rees,* 985 F.2d 283 (6th Cir. 1993), that the defendant "was deprived of the opportunity to present an effective defense when he was denied an independent pathologist in order to challenge the government's position as to the victim's cause of death." *Id.* at 284.

The Fifth Circuit has not directly ruled on the question but appears to have accepted the underlying premise that due process may require the appointment of nonpsychiatric experts in appropriate circumstances. Without citing *Teague*, the court said in *Yohey v. Collins,* 985 F.2d 222, 227 (5th Cir. 1993), that the trial court's denial of a request for forensic and firearms experts did not violate due process for the sole reason that the defendant failed to make the requisite showing of need; *see also Scott v. Louisiana,* 934 F.2d 631, 633 (5th Cir. 1991) (holding that state court's refusal to appoint independent firearms expert would violate due process if ballistics evidence was "critical to the conviction" and "subject to varying expert opinion").

The Tenth and Eleventh Circuits have been asked on numerous opportunities to address the issue. In *United States v. Greschner,* 802 F.2d 375, 377 (10th Cir. 1986), and *Coleman v. Brown,* 802 F.2d 1227, 1236-37 (10th Cir. 1986), the Tenth Circuit declined to decide whether the rule of

Ake applied to the defendants' requests for a penologist and a private investigator, respectively, because in each instance the defendant had failed to make the requisite showing of need. In a more recent decision, however, the Tenth Circuit has applied the rule of *Ake* beyond its specific facts. In *Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992), the court vacated a Kansas habeas petitioner's convictions because the trial court had failed to provide funds to obtain the services of an expert in "battered woman's syndrome." *Id.* at 311-13. Although *Dunn* was not a case where petitioner's "sanity was at issue," the court concluded that the expert was nevertheless necessary to rebut the state's evidence of intent, a necessary element of the crime with which petitioner was charged. *Id.* at 313. *See also Williamson v. Reynolds*, 904 F. Supp. 1529, 1562 (E.D.Okla. 1995), *aff'd on other grounds sub nom. Williamson v. Ward,* 110 F.3d 1508 (10th Cir. 1997) (granting habeas relief because trial court failed to fund hair and serology experts where hair and semen were only physical evidence connecting defendant and co-defendant to crime).

The Eleventh Circuit, like the Tenth Circuit, has avoided resolving the question. *See Baxter v. Thomas*, 45 F.3d 1501, 1511 n.24 (11th Cir. 1995) (request for "nonpsychiatric experts"); *Stephens v. Kemp,* 846 F.2d 642, 646-47 (11th Cir. 1988) (*en banc*) (request for firearms expert); *McKinley v. Smith*, 838 F.2d 1524, 1529 & n.9 (11th Cir. 1988) (request for pathologist); *Moore v. Kemp,* 809 F.2d 702 (11th Cir. 1987) (*en banc*) (request for criminologist and other forensic experts). Although the court did not reach the issue in *Moore*, the court noted the confusion created by this Court's first footnote in *Caldwell v. Mississipi,* 472 U.S. 320 (1985):

> The Supreme Court's statement in *Caldwell* implies that the government's refusal to provide nonpsychiatric expert assistance could, in a given case, deny a defendant a fair trial. The implication is questionable, however, in light of the Court's subsequent statement that it had "no need to determine as a matter of federal constitutional law what *if any* showing would have entitled a defendant to assistance of the type [Caldwell] sought." *Id.* (emphasis added). We nonetheless assume, for

> sake of argument, that the due process clause could require the government, both state and federal, to provide nonpsychiatric expert assistance to an indigent defendant upon a showing of need.

Moore, 809 F.2d at 711. In this *en banc* decision, five judges wrote separately to emphasize that the constitution should only require the appointment of nonpsychiatric experts when such assistance is "vital to the resolution of the issues":

> Absent further direction from the Supreme Court, I am convinced that unless non-psychiatric expert assistance is, because of the nature of the issue on which it is sought, as vital to the resolution of the issues as psychiatric assistance was in *Ake*, the Constitution does not require that it be provided in a criminal trial.

Id. at 737 (Hill, J., concurring in part and dissenting in part). Six other members of the court wrote separately, expressing their views that this Court's decision in *Ake* molded an "elastic rule" that should be logically and appropriately applied to requests for nonpsychiatric experts when the facts of a particular case warrant it:

> *Caldwell*, read in conjunction with *Ake*, teaches us several things. First, it reaffirms that the obvious object of the Court's reticence in *Ake* was the need for flexible decision making tailored to the facts of a given case. Capital cases do not lend themselves to rigid, ritualistic formulae. Second, it belied the state's suggestion that *Ake* must be read narrowly and confined to its facts. *Caldwell's* footnote 1 suggests that the Court was willing to entertain extending *Ake* in the fashion Moore requests today. Rather than rejecting the claim out of hand as inappropriately stretching *Ake* to a different question, the Court refused to grant relief only because Caldwell failed to make a showing of sufficient need under *Ake's* flexible standard.

Id. at 741 (Johnson, J., concurring in part and dissenting in part). The Fourth Circuit, unlike Judge Johnson and his colleagues, reads the *Caldwell* footnote as suggesting that the Court has *not* been willing to read *Ake* as applying to experts other than psychiatrists. *See Gray*, 58 F.3d at 66-67.

The foregoing cases demonstrate that there is a conflict among the courts of appeals as to whether or not the rule of *Ake* applies to requests for nonpsychiatric experts and therefore whether recognition of such a right would announce a new rule. The breadth of the conflict also shows that

this Court's dicta in the first footnote of *Caldwell* has been a source of confusion among the lower courts. The Court should grant certiorari both to resolve the conflict, and to clear away any uncertainty created by its footnote in *Caldwell*.

C. The Fourth Circuit's Narrow Reading of *Ake* is Contrary to the Decisions of the Highest Courts of Every State That Has Squarely Addressed the Issue and Fails to Accord Appropriate Deference to the Virginia Supreme Court

The Fourth Circuit's conclusion that *Ake* is limited to the appointment of a psychiatrist is at odds with the decisions of the highest court in every state that has considered the issue. *See Dubose v. State*, 662 So.2d 1189, 1194 (Ala. 1995) (holding that *Ake* establishes right to appointment of nonpsychiatric experts, including DNA experts); *Ex parte Moody*, 684 So.2d 114, 119 (Ala. 1996) (*Ake* extends to firearms experts and other experts necessary to defense); *Thornton v. State*, 339 S.E.2d 240, 241 (Ga. 1986) (allowing appointment of dental expert where impressions of defendant's teeth were only link between defendant and homicide and issue was subject to varying expert opinions); *Bright v. State*, 455 S.E.2d 37, 47 (Ga. 1995) (due process principles of *Ake* apply when assessing indigent defendant's request for nonpsychiatric experts), *cert. denied*, 516 U.S. 872 (1995); *Tatum v. State* 380 S.E.2d 253 (Ga. 1989) (firearms expert); *People v. Lawson*, 644 N.E.2d 1172, 1188-89 (Ill. 1994) (acknowledging federal due process basis, as well as state constitutional basis, for defendant's request for fingerprint and shoeprint experts); *State v. Coker*, 412 N.W.2d 589, 592-93 (Iowa 1987) (finding defendant entitled to intoxication expert where criminal responsibility at the time of offense was significant issue); *State v. Craig*, 637 So.2d 437 (La. 1994) (having made requisite showing of necessity under *Britt*, *Caldwell*, and *Ake*, parish could be ordered to fund experts and investigators in capital cases); *Polk v. State*, 612 So.2d 381 (Miss. 1992) (applying reasoning of *Ake* to hold that due process considerations require defendant to have access to DNA

expert); *Harrison v. State*, 635 So.2d 894 (Miss. 1994) (holding that *Ake* required appointment of pathologist to assist defendant); *State v. Bridges*, 385 S.E.2d 337 (N.C. 1989) (under *Ake* and *Caldwell*, defendant was entitled to fingerprint expert); *State v. Coffey*, 389 S.E.2d 48 (N.C. 1990) (hair and fiber analysis); *In re Allen R.*, 506 A.2d 329 (N.H. 1986)(Souter, J.) (*Ake* applied to request for psychologist to render opinion regarding juvenile's understanding of *Miranda* warnings); *Rogers v. State*, 890 P.2d 959, 966-67 (Okla..Crim. App. 1995) ("the principles of *Ake* have been extended to any expert necessary for adequate defense"); *Bailey v. State* 424 S.E.2d 503, 505 (S.C. 1992) (holding that statue which fails to provide that court-appointed defense counsel in capital cases be compensated for expenses, including experts and investigators, violates constitution); *State v. Stuck*, 434 N.W.2d 43, 51 (S.D. 1988) (defendant entitled to fingerprint expert under *Caldwell* if he makes sufficient showing of need); *Rey v. State*, 897 S.W.2d 333, 337-38 (Tex. Crim. App. 1995) ("*Ake* is not limited to psychiatric experts").[13]

For purposes of the new rule doctrine, what is significant about these state court decisions is not just that they unanimously interpret *Ake* as applying to nonpsychiatric experts, but also that nearly all of them were decided *before* Weeks' conviction became final. The legal landscape at the

[13]Numerous other state courts appear to have assumed that *Ake* applies to other types of experts because they entertained defendants' *Ake* claims with respect to the appointment of a variety of types of experts, but rejected those claims for other reasons. *See, e.g., State v. Gordius*, 544 A.2d 309, 311 (Me. 1988) (rejecting request for expert to testify to accuracy of child's recollection because defendant did not demonstrate that expert's opinion was beyond common knowledge); *Hough v. State*, 560 N.E.2d 511, 516 (Ind. 1990) (denying request for firearms expert because defendant failed to show need); *State v. Edwards*, 868 S.W.2d 682, 697-98 (Tenn. Crim. App.1993) (finding defendant was not entitled to DNA expert when he failed to meet minimum requirement for threshold showing of need); *Davis v. State*, 863 S.W.2d 259, 266 (Ark. 1993) (holding that defendant was not entitled to firearms expert because he failed to make specific showing of need), *cert. denied*, 511 U.S. 1026 (1994); *State v. Volker*, 477 N.W.2d 909 (Minn. App. 1991) (*Ake* applies to request for expert evaluation of breath alcohol analyzer but defendant failed to make threshold showing).

time of Weeks' case included all but one of these state court decisions. Existing precedent did not include then, as it does not include now, *any* decision of the highest court of a state holding that federal due process entitles an indigent defendant to a psychiatrist but not to any other kind of expert.

Moreover, as Weeks has explained *supra*, if the Virginia Supreme Court had addressed this issue when Weeks presented it on direct review, the state court undoubtedly would have held that Weeks was constitutionally entitled to nonpsychiatric experts. The year after Weeks' conviction became final, the state's highest court confirmed in another case that:

> *Ake* [*v. Oklahoma*, 470 U.S. 68 (1985)] and *Caldwell* [*v. Mississippi*, 472 U.S. 320 (1985)], when read together, require that the Commonwealth of Virginia, upon request, provide indigent defendants with "the basic tools of an adequate defense," *Ake*, 470 U.S. at 77, and, that in certain instances, these tools may include the appointment of non-psychiatric experts.

Husske v. Commonwealth, 476 S.E.2d 920, 925 (Va. 1996), *cert. denied*, 519 U.S. 1154 (1997). In reaching this conclusion, the Virginia Supreme Court surveyed the legal landscape and relied upon the very state and federal cases that Weeks has cited above. *Id.*

"At bottom . . . , the *Teague* doctrine 'validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.'" *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (quoting *Butler v. McKellar*, 494 U.S. 406, 414 (1990)). "The purpose [of the new rule doctrine] is to determine whether application of a new rule would upset a conviction that was obtained in accordance with the constitutional interpretations existing at the time of the prisoner's conviction." *Wright*, 505 U.S. at 307 (Kennedy, J., concurring in the judgment). In light of the Virginia Supreme Court's interpretation of *Ake* and *Caldwell* in *Husske*, the Fourth Circuit appears to have turned the *Teague* doctrine on its head. Rather than deferring to the Virginia Supreme Court's good-faith interpretation of *Ake*, which was

based on the legal landscape that existed at the time Weeks' conviction became final and which the state court undoubtedly would have invoked if it had addressed the issue in Weeks' case, the Fourth Circuit substituted its own narrow interpretation of this Court's precedents and imposed it on the state court. The Fourth Circuit justified this action by indicating, without basis, that the state court's decision in *Husske* was merely discretionary rather than compelled. (App. at 17-18.)

This Court should grant certiorari to consider whether, under the new rule doctrine, a federal court may impose its own view that a particular rule was not *compelled* by precedent despite compelling evidence that the state court would have reached the opposite conclusion based on the legal landscape that existed at the time the defendant's conviction became final.

D. The Right to Nonpsychiatric Experts Comes Within the "Watershed" Exception to the Antiretroactivity Doctrine

Federal habeas courts are not barred from announcing new "'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Graham v. Collins*, 506 U.S. 461, 478 (1993) (quoting *Teague*, 489 U. S. at 311). The Fourth Circuit held that the rule Weeks sought to apply did not come within this "watershed" exception.

The right to counsel articulated in *Gideon v. Wainwright*, 372 U.S. 335 (1963), is the most commonly cited example of a rule so fundamental that it would fit the "watershed" category. An indigent defendant's right of access to nonpsychiatric experts is very similar to the right to counsel established in *Gideon*. Just as an ordinary individual cannot intelligently investigate and present a defense to a criminal charge without the assistance of an expert in the substantive and procedural law, neither the defendant nor his counsel can intelligently investigate and present a defense to the state's forensic evidence without the assistance of a person with appropriate expertise. Few criminal defense lawyers are also experts in pathology or toolmarks or molecular genetics or metallurgy or

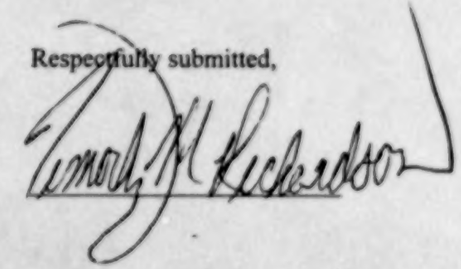
poison chemistry or any of the myriad other technical subjects that may arise in a criminal prosecution. Experts in all of these areas are freely available to the prosecution from state crime labs, the FBI, and specialized laboratories, and thus may appear in any criminal prosecution.

Furthermore, as Weeks argued below, to hold that indigent criminal defendants have a federal constitutional right to the appointment of a psychiatrist in appropriate circumstances but do not have a corresponding right to appointment of a nonpsychiatric expert would be fundamentally unfair. Therefore, the Court should grant certiorari to determine whether an indigent defendant's right of access to nonpsychiatric experts comes with the "watershed" exception to *Teague*.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari on each of Weeks' questions presented.

Respectfully submitted,



Sterling H. Weaver, Sr., Esq.
P.O. Box 543
Portsmouth, VA 23705
(757) 393-0237

Glen A. Huff, Esq.
Timothy M. Richardson, Esq.
Counsel of Record
HUFF, POOLE & MAHONEY, P.C.
4705 Columbus Street
Virginia Beach, Virginia 23462
(757) 499-1841

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(3)

No. 99-5746

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

Supreme Court, U.S.
FILED
AUG 10 (99)
OFFICE OF THE CLERK

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Scheduled
September 1, 1999

Sterling H. Weaver, Sr., Esq.
P.O. Box 543
Portsmouth, VA 23705
(757) 393-0237

Counsel for Petitioner

Glen A. Huff, Esq.
Timothy M. Richardson, Esq.
Counsel of Record
Huff, Poole & Mahoney, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
(757) 499-1841

Counsel for Petitioner

RECEIVED
HAND DELIVERED
AUG 16 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

91 pp

As this Court held in response to a similar challenge in *United States v. Porter*, 909 F.2d 789, 794–95 (4th Cir.1990), "[t]his challenge does not state an appealable question under 18 U.S.C. § 3742." *Id.*

V.

Accordingly, the sentence imposed by the district court is

AFFIRMED.

Lonnie WEEKS, Jr., Petitioner-Appellant,

v.

Ronald J. ANGELONE, Director of the Virginia Department of Corrections, Respondent-Appellee.

No. 98-21.

United States Court of Appeals, Fourth Circuit.

Argued March 1, 1999.

Decided May 10, 1999.

After his conviction for capital murder of state trooper was affirmed on appeal, 248 Va. 460, 450 S.E.2d 379, petitioner sought habeas corpus relief. The United States District Court for the Eastern District of Virginia, Rebecca B. Smith, J., 4 F.Supp.2d 497, dismissed petition. On petitioner's application for certificate of appealability, the Court of Appeals, Williams, Circuit Judge, held that: (1) jury instructions at sentencing did not improperly preclude jury from considering relevant mitigating evidence; (2) claim that petitioner was entitled to appointment of pathology and ballistics experts would require application of new rule in violation of *Teague*; (3) admission of petitioner's confession that was made after petitioner initially cut off questioning was not contrary to or unreasonable application of Supreme Court precedent; (4) petitioner procedurally defaulted claims which state supreme court declined to address due to noncompliance with procedural rule; (5) petitioner procedurally defaulted claims which he failed to brief before state supreme court; and (6) petitioner procedurally defaulted his claim of ineffective assistance of counsel.

Application for certificate of appealability denied and petition dismissed.

1. Habeas Corpus ⇐452

For a claim that was adjudicated on the merits in state court proceedings, Court of Appeals will not issue a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act (AEDPA) unless (1) the state court decision is in square conflict with Supreme Court precedent that is controlling as to law and fact or (2) if no such controlling decision exists, the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant Supreme Court precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts. 28 U.S.C.A. § 2254(d).

2. Habeas Corpus ⇐842

When a habeas petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits, Court of Appeals reviewing denial of habeas relief reviews questions of law and mixed questions of law and fact de novo.

3. Habeas Corpus ⇐422

State Supreme Court's statement that capital murder defendant effectively presented no argument in support of his claim that trial court's actions prevented jury from considering relevant mitigating evidence at sentencing did not establish that dismissal of that claim was procedural, in view of other statements indicating that claim was addressed on the merits, so claim was reviewable in federal habeas proceeding.

4. Habeas Corpus ⇐450.1

Where the state supreme court has adjudicated a claim on the merits but has given no indication of how it reached its decision, a federal habeas court must still apply the standards of review set forth in Antiterrorism and Effective Death Penalty Act (AEDPA), and a state court's perfunctory decision is reasonable if it is at least minimally consistent with the facts and circumstances of the case. 28 U.S.C.A. § 2254(d).

5. Homicide ⇐358(1)

Jury instructions at sentencing in capital murder trial did not improperly preclude jury from considering relevant mitigating evidence, despite court's failure to explicitly state that jury was not required to sentence defendant to death upon finding of at least one aggravating factor, upon jury's request for clarification of instructions.

6. Criminal Law ⇐1213.8(8)

The Eighth Amendment requires that a capital jury be able to consider and give effect to all relevant mitigating evidence offered by the defendant. U.S.C.A. Const. Amend. 8.

7. Criminal Law ⇐1208.1(5)
Homicide ⇐357(1)

Evidence about the defendant's background and character is necessary for the sentencer to make an individualized assessment of the appropriateness of the death penalty.

8. Criminal Law ⇐822(1)

In determining the validity of a challenged jury instruction, the instruction may not be judged in artificial isolation, but must be viewed in the context of the overall charge.

9. Habeas Corpus ⇐383

State prisoner's claim that trial court erred by denying his motion for expert assistance in fields of pathology and ballistics was cognizable on federal habeas review, even if state supreme court reached no federal constitutional issue with respect to that claim, where prisoner's brief on direct appeal to state supreme court clearly alleged that denial of expert assistance violated the Fifth, Sixth, and Fourteenth Amendments. U.S.C.A. Const.Amends. 5, 6, 14.

10. Habeas Corpus ⇐452, 453

A federal court may grant habeas relief only on the ground that the petitioner is in custody in violation of the Constitution or laws or treaties of the United States; therefore, when a petitioner's claim rests solely upon an interpretation of state case law and statutes, it is not cognizable on federal habeas review. 28 U.S.C.A. § 2254(a).

11. Habeas Corpus ⇐319.1, 380.1

A federal habeas court cannot hear a petitioner's federal claims unless he has first exhausted state remedies, which requires that the petitioner fairly present the substance of his federal claim to the state courts. 28 U.S.C.A. § 2254(b, c).

12. Habeas Corpus ⇐385

Habeas petitioner's claim that state trial court erred by denying his motion for expert assistance in fields of pathology and ballistics was not addressed by state supreme court on direct appeal, so habeas court would not review claim under standards of Antiterrorism and Effective Death Penalty Act (AEDPA), but would

"adequately satisfies the Guidelines' goals relating to deterrence, retribution, and incapacitation." *Pitts*, 973 F.Supp. at 584. The court did not indicate a belief that it was foreclosed from considering Pitts's post-conviction cooperation. In fact, the court did consider various excuses offered by Pitts and found that they "can never justify or mitigate his actions. Even to assert such excuses is a further affront." *Id.* at 584–85.

review claim de novo because it required court to apply a legal standard to a given set of facts. 28 U.S.C.A. § 2254(d).

13. Habeas Corpus ⇐380.1

The fact that the state court did not address a petitioner's federal constitutional claim does not render his claim unreviewable on federal habeas if he demonstrates that the state court had a fair opportunity to address the claim.

14. Criminal Law ⇐1077.1(1)

Finding that state defendant was entitled to expert assistance at trial in fields of pathology and ballistics would require announcement of new rule, for purpose of *Teague*'s antiretroactivity principles, because, at time defendant's conviction became final, Supreme Court precedent required only that indigent defendant be appointed psychiatric experts when defendant's sanity was at issue.

15. Courts ⇐100(1)

Habeas Corpus ⇐461

Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions, which are new rules that place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe and watershed rules of criminal procedure that significantly improve the accuracy of the factfinding procedure and implicate the fundamental fairness of the trial.

16. Habeas Corpus ⇐461

In general, a case announces a new rule, for purpose of *Teague* antiretroactivity principles, if the result was not dictated by precedent existing at the time the defendant's conviction became final, and a petitioner cannot receive federal habeas relief unless reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to rule in his favor.

17. Habeas Corpus ⇐461

In determining whether petitioner seeks a new rule on collateral review, for purpose of *Teague*'s antiretroactivity principles, court first should determine date on which petitioner's conviction became final, and then consider whether state court considering petitioner's claim at that time would have felt compelled by existing precedent to conclude that rule he sought was required by the Constitution; if not, then rule is new, and, if rule is determined to be new, final step in *Teague* analysis requires court to determine whether rule nonetheless falls within one of *Teague*'s narrow exceptions.

18. Criminal Law ⇐1077.1(1)

Government, upon request, must provide indigent defendants with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners; although the government need not purchase for the indigent defendant all the assistance that a wealthier defendant might buy, fundamental fairness requires that indigent defendants have an adequate opportunity to present their claims fairly within the adversary system.

19. Courts ⇐100(1)

Retroactive application of Virginia Supreme Court's *Husske* decision, holding that indigent defendant may be entitled to appointment of nonpsychiatric experts, to determine that defendant was entitled to expert assistance in fields of pathology and ballistics would violate *Teague*'s antiretroactivity principles, because rule did not amount to watershed rule of criminal procedure that would significantly improve accuracy of factfinding procedure and implicate fundamental fairness of trial.

20. Habeas Corpus ⇐490(3)

Finding that second interrogation of defendant, after defendant had initially cut off questioning during first interrogation, scrupulously honored defendant's right to cut off questioning was neither contrary to nor unreasonable application of Supreme

Court's *Mosley* decision, and thus did not warrant habeas relief; although both interrogations concerned the same crime, defendant received full *Miranda* warnings during first interrogation, initial interrogation ceased immediately once defendant invoked his right to cut off questioning, over ten hours passed between time defendant invoked his right to cut off questioning and the second interrogation, and defendant was asked if he remembered warnings given at first interrogation.

21. Criminal Law ⇐412.1(4)

There is no bright-line test to determine whether a suspect's right to cut off questioning was "scrupulously honored," for purpose of determining whether resumption of questioning was permissible after suspect in custody had indicated that he wished to remain silent; instead, the touchstone is whether a review of the circumstances leading up to the suspect's confession reveals that his right to cut off questioning was fully respected.

22. Criminal Law ⇐412.1(4)

A significant period of time between interrogations does not require a durational minimum, in determining whether second interrogation sufficiently honored defendant's right to cut off questioning; instead, a significant period of time is a function of to what degree the police persisted in repeated efforts to wear down the suspect's resistance and make him change his mind.

23. Criminal Law ⇐519(9)

Where other factors indicate that a defendant's right to cut off questioning was scrupulously honored, the mere fact that a second interrogation involves the same crime as the first interrogation does not necessarily render a confession derived from the second interrogation unconstitutionally invalid.

24. Habeas Corpus ⇐401, 404, 422

Under doctrine of procedural default, a federal habeas court may not review a claim that a state court has found to be clearly and expressly defaulted under an independent and adequate state procedural rule unless the prisoner can demonstrate cause for the default and prejudice resulting therefrom or demonstrate that a failure to consider the claims will result in a fundamental miscarriage of justice.

25. Habeas Corpus ⇐422

A state rule is "adequate" to support finding of procedural default in habeas proceeding if it is firmly established and regularly and consistently applied by the state court, and rule is "independent" if it does not depend on a federal constitutional ruling.

See publication Words and Phrases for other judicial constructions and definitions.

26. Habeas Corpus ⇐401

Under the miscarriage of justice doctrine, a writ of habeas corpus may be granted even without a showing of cause for procedural default if a constitutional violation has probably resulted in the conviction of someone who is actually innocent, and, to show "actual innocence" of the death penalty in a capital case, a petitioner must show by clear and convincing evidence that but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.

27. Habeas Corpus ⇐403

Claims which state supreme court declined to address on ground that defendant failed to register relevant objections at trial, pursuant to state procedural rule, were procedurally defaulted because that rule was firmly established and was regularly and consistently applied by that state's courts, even if it was not applied in a few cases. Va.Sup.Ct.Rules, Rule 5:25.

28. Habeas Corpus ⇐374.1, 403

Dismissal of federal habeas petitioner's claims by state supreme court on direct appeal, based on his failure to brief or argue alleged errors, provided adequate and independent state ground to bar fed-

eral review, despite petitioner's claim that court's 50–page brief limit physically prevented him from presenting all claimed errors to that court, as petitioner had opportunity to present his claims, and state had regularly and consistently refused to consider claims not briefed or argued on direct appeal. Va.Sup.Ct.Rules, Rule 5:26(a).

29. Habeas Corpus ⇐405.1

Page limit imposed by State Supreme Court on briefs for direct appeal from criminal conviction did not amount to cause for defendant's default of claims which he chose not to brief before that court, so claims were not cognizable on federal habeas review, as page limit was reasonable and was consistently applied. Va.Sup.Ct.Rules, Rule 5:26(a).

30. Habeas Corpus ⇐405.1

The existence of cause for a procedural default that would permit federal habeas review must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's effort to comply with the state's procedural rule.

31. Habeas Corpus ⇐380.1

Defendant's presentation of claims in his original brief on direct appeal to state supreme court did not preserve those claims for purpose of federal habeas review, where claims were subsequently cut from brief that was ultimately filed with court, due to court's page limits. Va.Sup.Ct.Rules, Rule 5:26(a).

32. Habeas Corpus ⇐363, 378

To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court, although a claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it; thus, the exhaustion requirement is also satisfied when a state procedural rule would bar consideration of the unexhausted claim if the claim was presented to the state court.

33. Constitutional Law ⇐306(6)
Habeas Corpus ⇐406

Alleged ineffective assistance of counsel for petitioner on his state habeas petition could not constitute cause to excuse petitioner's defaulted claim that trial counsel was ineffective, because petitioner had no constitutional right to counsel in state habeas proceedings, and petitioner could not claim entitlement to such counsel under guise of due process clause. U.S.C.A. Const.Amends. 6, 14.

34. Habeas Corpus ⇐406

Ineffective assistance of counsel may constitute cause for a procedural default under certain circumstances, but, for an attorney error to constitute cause, a petitioner must first possess a constitutional right to assistance of counsel. U.S.C.A. Const.Amend. 6.

35. Habeas Corpus ⇐486(5)

Although a petitioner may claim a due process violation occurring in his state habeas proceeding, he may not premise this claim solely on the alleged ineffective assistance of state habeas counsel. U.S.C.A. Const.Amends. 6, 14.

ARGUED: Timothy Meade Richardson, Huff, Poole & Mahoney, P.C., Virginia Beach, Virginia, for Appellant. Robert H. Anderson, III, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellee. ON BRIEF: Glen A. Huff, Huff, Poole & Mahoney, P.C., Virginia Beach, Virginia; Sterling H. Weaver, Sr., Portsmouth, Virginia, for Appellant. Mark L. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellee.

Before WILKINSON, Chief Judge, and HAMILTON and WILLIAMS, Circuit Judges.

Application for a certificate of appealability denied and petition dismissed by published opinion. Judge WILLIAMS wrote the opinion, in which Chief Judge WILKINSON and Judge HAMILTON joined.

OPINION

WILLIAMS, Circuit Judge:

On October 21, 1993, a Commonwealth of Virginia jury convicted Lonnie Weeks, Jr., of the capital murder of Virginia State Trooper Jose Cavazos. Following the jury's determination that Weeks's conduct satisfied the "vileness" aggravating factor, the trial court sentenced Weeks to death. After exhausting all available state remedies, Weeks petitioned the United States District Court for the Eastern District of Virginia for habeas corpus relief. *See* 28 U.S.C.A. § 2254 (West 1994 & Supp.1998). The district court dismissed his petition. Weeks subsequently filed an application for a certificate of appealability with this Court raising numerous constitutional claims of error. Weeks argues, *inter alia*, that the trial court's refusal to clarify its capital sentencing instruction to the jury after they indicated confusion with the instruction prevented the consideration of relevant mitigating evidence in violation of the Eighth and Fourteenth Amendments, that the trial court's refusal to appoint ballistics and pathology experts violated his due process rights under the Fourteenth Amendment, and that the Supreme Court of Virginia's refusal to suppress his confession to the murder of Trooper Cavazos violated his Fifth and Fourteenth Amendment rights. After reviewing the record and briefs and hearing oral argument, we conclude that Weeks has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C.A. § 2253(c)(2) (West Supp.1998). Accordingly, we deny his application for a certificate of appealability and dismiss his petition.

I.

The undisputed facts of this case, as recited by the Supreme Court of Virginia, are as follows:

In early February 1993, [Weeks], who was age 20, a North Carolina resident, and on probation for a 1992 drug conviction, participated in the burglary of a residence in the Fayetteville, North Carolina area. During the course of that crime, [Weeks] obtained a set of keys to a 1987 Volkswagen Jetta automobile parked at the residence, and stole the vehicle. Later that month, [Weeks] drove the vehicle to Washington, D.C., intending to sell it or trade it for drugs. [Weeks] carried in the vehicle a Glock Model 17, nine millimeter, semi-automatic pistol loaded with hollow-point bullets. According to the testimony, the bullets were designed for police use, not target practice or hunting; this type of bullet is referred to as a "man stopper."

During the late evening of February 23, [Weeks] was riding as a passenger in the vehicle being driven by his uncle, 21–year–old Lewis J. Dukes, Jr., a resident of the District of Columbia. The pair was traveling en route from Washington to Richmond southbound on Interstate Route 95.

Around midnight, Trooper Cavazos was operating radar from his marked police vehicle parked in the highway medium monitoring southbound traffic. The Volkswagen driven by Dukes passed the trooper's position at a high rate of speed. The officer activated his vehicle's emergency lights and proceeded to chase the vehicle occupied by [Weeks]. After traveling a brief distance, and passing other vehicles by driving on the right shoulder of the highway, Dukes brought the car to a stop on the Dale City exit ramp, in a dark, remote area.

The trooper pulled his patrol car to a stop behind the Volkswagen, which he approached on foot on the driver's side. Upon the officer's request, Dukes alight-

ed and was standing toward the left rear of the Volkswagen when the trooper asked [Weeks] to step out of the vehicle.

[Weeks] complied with the officer's request and alighted on the right side of the vehicle as the trooper was near the left side. As [Weeks] left the vehicle he was carrying the fully loaded pistol. He then fired at least six bullets at the officer, two of which entered his body beside the right and left shoulder straps of the protective vest the trooper was wearing. The officer was immediately rendered unconscious and fell to the pavement, dying within minutes at the scene with his police weapon in its "snapped" holster.

[Weeks], with Dukes as a passenger, then drove the Volkswagen from the scene and parked it on the lot of a nearby service station. [Weeks] returned to the scene of the crime on foot and retrieved Dukes' District of Columbia driver's license that had been dropped on the pavement. [Weeks] rejoined Dukes, and they were found by police shortly thereafter in the parking lot of a nearby motel.

. . . . . .

About 2:45 a.m., after [Weeks] had been with [the Prince William County police officer who had first encountered Weeks in the motel parking lot] for about two hours, state police officers arrived to question [Weeks] and Dukes. Near 3:00 a.m., state police Special Agent J.K. Rowland met [Weeks] in the motel lobby. Rowland "explained to him that he was not under arrest" and asked [Weeks] "if he would like to talk ... about what he had seen up on Interstate 95." [Rowland], who ... testified [that Weeks] was "free to leave at that time," conducted an interview with [Weeks] in private in one of the motel rooms.

. . . . . .

[A]s Rowland questioned [Weeks] in the motel room, Rowland became "more and more suspicious" of[Weeks]. Even though [Weeks] "was free to leave" at that point, Rowland advised [Weeks] of his constitutional rights according to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as a precaution at 7:40 a.m. [Weeks] then exercised his right to remain silent and wrote, "Do not want to discuss case any further," on the "Advice of Rights" form that he signed. Rowland honored this request, and ceased questioning.

At 7:50 a.m., Rowland was advised by another investigator that Dukes had just stated that [Weeks] shot the trooper. Rowland arrested [Weeks] at 7:52 a.m.

Subsequently, [Weeks] was taken before a magistrate and then to the Adult Detention Center in Manassas. Later that morning, classification officers in the jail routinely questioned [Weeks] about his physical and mental state; no attempt was made to elicit information about the crime. During the interview, [Weeks] indicated that he was considering suicide because he had shot the trooper. [Weeks] also voluntarily wrote a letter to a jail officer admitting the killing and expressing remorse. [Weeks] does not contest either of these admissions but attacks the constitutional validity of the following interview.

Near 6:00 p.m. on February 24, [Weeks] was brought to the lounge of the local prosecutor's office where Rowland again interviewed him; additional information had been developed by the police during the day between the termination of the first interview and the beginning of the second interview. Rowland asked [Weeks], "Do you remember the rights I read to you earlier today?" to which[Weeks] responded affirmatively. Rowland proceeded "to summarize the investigation through the course of the day's events to that point in time."

Among other things, Rowland told [Weeks] that an eyewitness to the shooting had made a positive identification of

him as the assailant. A witness actually had identified [Weeks] as a person she saw at the scene after the homicide, but she had not witnessed the shooting. At the conclusion of Rowland's summary, he said to [Weeks], "This is your opportunity to provide your explanation as to what happened at the shooting scene." [Weeks] responded, "Yes, I was packing." The officer knew that "packing" meant "carrying a firearm."

[Weeks] then confessed to the trooper's murder. [Weeks] stated that when the trooper asked him to get out of the Volkswagen, he picked up the pistol and "thought about throwing it away." Instead, he saw the trooper put his hand down toward his service revolver. [Weeks] said he then "panicked" and shot the victim "several times rapidly." [Weeks] stated that he drove, with Dukes as a passenger, to the service station, placing the pistol under the front floor mat of the Volkswagen. This interview lasted about one hour during which [Weeks] readily answered questions and did not invoke his right to remain silent or any other constitutional right.

Weeks v. Commonwealth, 248 Va. 460, 450 S.E.2d 379, 382–86 (Va.1994).

After a jury trial in the Circuit Court of Prince William County, Virginia, Weeks was convicted of the capital murder of Cavazos pursuant to Va.Code Ann. § 18.2-31(5) (Michie Supp.1998).[1] Based on its finding—made during the sentencing phase of Weeks's trial—that Weeks's conduct was outrageously or wantonly vile in that it involved depravity of mind and/or aggravated battery to the victim beyond the minimum necessary to commit the murder, *see* Va.Code.Ann. § 19.2-264.4(C) (Michie 1995), the jury recommended that Weeks be sentenced to death. After conducting a post-trial hearing pursuant to Va.Code. Ann. § 19.2-264.5 (Michie 1995), the Circuit Court of Prince William County followed the jury's recommendation and sentenced Weeks to death. On direct appeal, the Supreme Court of Virginia upheld Weeks's conviction and death sentence. *See Weeks*, 248 Va. 460, 450 S.E.2d 379. The Supreme Court of the United States denied Weeks's petition for a writ of certiorari. *See Weeks v. Virginia*, 516 U.S. 829, 116 S.Ct. 100, 133 L.Ed.2d 55 (1995).

Weeks requested that the Circuit Court of Prince William County appoint counsel to assist him in preparing a state habeas petition. On October 10, 1995, the circuit court granted this request and Weeks's state habeas counsel filed a petition for habeas corpus. On December 1, 1995, state habeas counsel withdrew the petition from the circuit court after learning on that day that the appropriate court with which to file the petition was the Supreme Court of Virginia, because that court has sole jurisdiction over habeas petitions in death-sentence cases. State habeas counsel immediately mailed the petition by regular mail to the Supreme Court of Virginia on December 1, the last day for filing. The petition was filed on December 4, 1995.

On January 11, 1996, the Commonwealth filed a motion to dismiss Weeks's petition as jurisdictionally barred due to untimeliness under Va. Code § 8.01-654.1 and Rule 5:7A(a) of the Rules of the Supreme Court of Virginia. In its motion, the Commonwealth argued that the petition was not timely filed because the Supreme Court of Virginia does not accept pleadings sent in the mail on the last day for filing unless they are sent by certified or registered mail. On that same day, the Commonwealth also filed a motion to dismiss the petition on substantive grounds. On March 15, 1996, the Supreme Court of

1. Weeks also pleaded guilty to the use of a firearm in the commission of a murder and a related grand larceny charge, pursuant to Va. Code Ann. §§ 18.2-53.1 and 18.2-95 (Michie 1996 & Supp.1998), respectively, for which he was sentenced to a total of thirteen years in prison. These charges are not at issue on appeal.

Virginia dismissed the petition as jurisdictionally barred due to untimeliness.

On April 11, 1996, Weeks filed a petition for rehearing with the Supreme Court of Virginia. Weeks subsequently filed a purportedly *pro se* motion seeking the dismissal of his state habeas attorney for an alleged conflict of interest and leave to file a second habeas petition after the appointment of new counsel. That motion was denied by the Supreme Court of Virginia on May 31, 1996. One week later, on June 7, 1996, the Supreme Court of Virginia denied Weeks's petition for rehearing. On June 28, 1996, the Circuit Court of Prince William County entered an order setting Weeks's execution for August 19, 1996.

On August 14, 1996, Weeks filed a motion in the United States District Court for the Eastern District of Virginia requesting appointment of counsel, a stay of execution, and leave to proceed *in forma pauperis*. These motions were granted. Weeks was ordered to file his petition for writ of habeas corpus on or before February 7, 1997.

Weeks submitted his petition for a writ of habeas corpus in the district court on February 7, 1997. The matter was referred to a magistrate judge for the preparation of a report and recommendation pursuant to 28 U.S.C.A. § 636(b)(1)(B) and (C) (West 1993) and Rule 72(b) of the Federal Rules of Civil Procedure. On July 30, 1997, the magistrate judge filed a report and recommendation, recommending that the petition be denied and dismissed. By opinion and final order of April 1, 1998, the district court granted the Commonwealth's motion for summary judgment and denied and dismissed Weeks's petition for a writ of habeas corpus in its entirety. *Weeks v. Angelone*, 4 F.Supp.2d 497 (E.D.Va.1998). On April 15, 1998, Weeks moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). The district court denied this motion on June 19, 1998. On July 17, 1998, Weeks filed a timely notice of appeal. On October 16, 1998, Weeks filed an application for a certificate of appealability with this Court pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure.

On appeal, Weeks contends that he is entitled to habeas relief on the following grounds: (1) the trial court's failure to instruct the jury clearly that they were obliged to consider relevant mitigating evidence before making their sentencing determination created a reasonable probability that the jury interpreted the sentencing instructions in a way that prevented the consideration of constitutionally relevant evidence; (2) the trial court's refusal to appoint ballistics and pathology experts deprived him of his constitutional rights; (3) the trial court's failure to suppress evidence derived in violation of his Fifth Amendment right against self-incrimination deprived him of due process; (4) Rule 5:25 is not an adequate procedural bar to his claims that were not raised at trial; (5) the fifty-page brief limit imposed by the Supreme Court of Virginia excuses the procedural default of claims not briefed on direct appeal; and (6) his state habeas counsel's conflict of interest constituted a violation of due process that excused the procedural default of his ineffective-assistance-of-trial-counsel claims. We address Weeks's arguments in turn.

II.

[1, 2] The parties agree that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104–132, 110 Stat. 1214, governs this case.[2] For a claim that was adjudicated on the merits in state court proceedings, this Court will not issue a writ of habeas corpus under the AEDPA unless (a) the state court decision is in "square conflict" with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, "the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." *Green v. French*, 143 F.3d 865, 870 (4th Cir.1998). "In other words, *habeas* relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Id.* When a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits, however, our review of questions of law and mixed questions of law and fact is de novo. *See Jones v. Jones*, 163 F.3d 285, 299–300 (5th Cir. 1998) (applying pre-AEDPA de novo standard of review to claims of ineffective assistance of counsel that were properly raised, but not adjudicated on merits in state court).

2. The AEDPA prohibits federal habeas relief on any claim "adjudicated on the merits in State court proceedings," unless that adjudication resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254(d) (West Supp. 1998).

III.

First, Weeks argues that the trial court prevented the jury from considering relevant mitigating evidence in violation of *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). Specifically, Weeks points to the failure of the trial court, in response to a specific jury request for clarification, to instruct the jury clearly that it was not required to sentence Weeks to death upon finding at least one aggravating factor. In *Boyde*, the Supreme Court held that the proper inquiry into whether capital jury instructions satisfy the Eighth Amendment requirement that a sentencer give effect to mitigating evidence is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.

A.

During the penalty phase of Weeks's trial, the trial court gave the jury a lengthy sentencing instruction (Instruction # 2).[3] The trial court denied Weeks's proffered instruction, C1, which instructed the jury that it had the option to give effect to the mitigating evidence and sentence Weeks to life in prison even if it found the Commonwealth had proved one or both of the aggravating factors beyond

3. Instruction # 2 read as follows:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than $100,000. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> 1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
> 2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.
>
> If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

(J.A. at 264.)

a reasonable doubt. During its penalty phase deliberations, the jury asked the court whether it was their duty to issue the death penalty if they found that Weeks was guilty of one of the aggravating factors, or whether they must decide whether or not to issue a death sentence even after finding that one of the aggravating factors had been met. Rather than issuing a clarifying instruction, the trial court instructed the jury by written response to see the second paragraph of Instruction # 2, which read as follows:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you *may* fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you *shall* fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

(J.A. at 264 (emphases added).) The trial court overruled Weeks's objection and request that the jury be instructed that it could impose a life sentence upon finding one or both aggravating factors based upon its belief that the jurors "just have to be drawn to that paragraph to find their answer." (J.A. at 1344.) Following several more hours of deliberation, the jury sentenced Weeks to death.

[3] The Supreme Court of Virginia rejected Weeks's claim, contained in assignment of error no. 44, that the trial court's actions prevented the jury from considering relevant mitigating evidence on the ground that Weeks "effectively presents no argument in support of" his claim. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 383 (1994). The Commonwealth argues that this dismissal is procedural and that Weeks has procedurally defaulted any objection to the trial court's response to the jury's question about its sentencing options.

We disagree with the Commonwealth's characterization. First, in the sentence at the end of the same paragraph that states that Weeks "effectively presents no argument in support of," *inter alia*, assignment of error no. 44, the Supreme Court of Virginia concluded, "We have considered these so-called arguments and *find no merit* in any of [them]." *Id.* (emphasis added). Second, the Supreme Court of Virginia stated the following near the end of its opinion: "[D]efendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. We have considered all the arguments in support of these issues and conclude that *none has any merit*." *Id.* at 390 (emphasis added). Because Weeks's jury made two inquiries and Weeks's brief to the Supreme Court of Virginia made two assignments of error (nos. 43 and 44) regarding the court's response to jury instructions, the Supreme Court of Virginia's use of the term "inquiries," must have referred to both assigned errors nos. 43 and 44. The Supreme Court of Virginia therefore adjudicated assigned error no. 44 on the merits, allowing us to review this claim in a federal habeas proceeding.[4] *See Wright v. Angelone*, 151 F.3d 151, 156–57 (4th Cir. 1998) (holding that a perfunctory decision constitutes an adjudication on the merits).

[4] Where, as here, the state supreme court has adjudicated a claim on the merits but has given no indication of how it reached its decision, a federal habeas court must still apply the AEDPA standards of review. *See id.* A state court's perfunctory decision is reasonable if it " 'is at least minimally consistent with the facts and circumstances of the case.' " *Id.* at 157 (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir.), *cert. denied*, — U.S. —, 118 S.Ct. 72, 139 L.Ed.2d 32 (1997)).

4. The district court also concluded that the Supreme Court of Virginia dismissed this claim on the merits. *See Weeks v. Angelone*, 4 F.Supp.2d 497, 536 (E.D.Va.1998).

Therefore, the writ will not issue unless we determine that the Supreme Court of Virginia's disposition of this claim was either contrary to federal law as determined by the Supreme Court or an application or interpretation of Supreme Court precedent "that reasonable jurists would all agree," *Green v. French*, 143 F.3d 865, 870 (4th Cir.1998), was not " 'minimally consistent with the facts and circumstances of the case,' " *Wright*, 151 F.3d at 157 (quoting *Hennon*, 109 F.3d at 335).

B.

[5–8] The Eighth Amendment requires that a capital jury be able to consider and give effect to all relevant mitigating evidence offered by the petitioner. *See Eddings v. Oklahoma*, 455 U.S. 104, 112–14, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Evidence about the petitioner's background and character is necessary for the sentencer "to make an individualized assessment of the appropriateness of the death penalty." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In determining the validity of a challenged instruction, the instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). In *Boyde*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316, the Supreme Court fleshed out these principles, holding that the proper inquiry in cases where a capital sentencing instruction allegedly prevents the consideration of mitigating evidence is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380. Applying this rule to the petitioner's case in *Boyde*, the Supreme Court concluded that there was not a reasonable likelihood that the challenged instruction prevented the consideration of mitigating evidence, in light of the fact that the instruction told the jury that "you shall" consider "[a]ny other circumstance which extenuates the gravity of the crime" and that the jury was presented with four days of evidence at the penalty phase relating to Boyde's background and character. *Id.* at 381; *see id.* at 381–84.

Applying the *Boyde* inquiry in *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998), the Supreme Court upheld the constitutionality of the Virginia pattern capital sentencing instruction, the very instruction at issue in this case, against a challenge on Eighth and Fourteenth Amendment grounds. The Supreme Court first noted that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. However, the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan*, 118 S.Ct. at 761 (internal citations omitted). The Court further held, in pertinent part:

> The instruction did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on "all the evidence," the instruction afforded jurors an opportunity to consider mitigating evidence. The instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they "may fix" the penalty at death, but directed that if they believed that all the evidence justified a lesser sentence then they "shall" impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved.

Id. at 762. The Supreme Court concluded that "[e]ven were we to entertain some doubt as to the clarity of the instructions," the two days of testimony related to mitigating evidence and the extensive arguments of the defense and the prosecution on the effect such evidence should be given in the sentencing determination demon-

strated that there was "not a reasonable likelihood" that the instructions had precluded the jury's consideration of Buchanan's mitigating evidence in violation of *Boyde*. *Id.* at 762–63.

Given the Supreme Court's decision in *Buchanan*, Weeks is reduced to arguing that the trial court's failure to clarify a constitutionally sufficient instruction violated his Eighth and Fourteenth Amendment rights because the jury's question placed the trial court on notice that it was reasonably likely that the jury would apply the instruction in a way that prevented the consideration of mitigating evidence. We find this argument to be without merit. Following the jury's finding of guilt on the capital murder charge, Weeks presented mitigating evidence as to his religious upbringing, the abrupt manner in which the events surrounding the shooting unfolded, and his feelings of remorse. Defense counsel argued extensively that the jury should give this mitigating evidence great weight in the sentencing determination. "[W]e think it unlikely that reasonable jurors would believe the court's instructions transformed all of this favorable testimony into a virtual charade." *Boyde*, 494 U.S. at 383 (internal quotation marks omitted). In fact, the verdict form the jury returned specifically noted that in fixing Weeks's punishment at death, the jury "considered the evidence in mitigation of the offense." (J.A. at 258, 1345–46.) At the conclusion of the penalty phase, following the announcement of the verdict in open court, each member of the jury was polled and confirmed the verdict.

Under these circumstances, we believe that no reasonable juror would have understood the sentencing instruction to preclude the consideration of mitigating evidence even upon a finding of an aggravating factor. The Supreme Court of Virginia's summary disposition of this claim, therefore, was neither contrary to federal law as interpreted by the Supreme Court of the United States nor an application or interpretation of *Boyde* "that reasonable jurists would all agree," *Green*, 143 F.3d at 870, was not "minimally consistent with the facts and circumstances of the case," *Wright*, 151 F.3d at 157.[5]

IV.

Next, Weeks argues that the trial court's denial of his request for appointed ballistics and pathology experts violated his rights under the Fourteenth Amendment.[6] As support for his argument, Weeks cites the Supreme Court of Virginia's opinion in *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (Va.1996), *cert. denied*, 519 U.S. 1154, 117 S.Ct. 1092, 137 L.Ed.2d 225 (1997), decided one year after Weeks's conviction became final. In *Husske*, the Supreme Court of Virginia held that in certain instances, indigent defendants must be provided with non-psychiatric experts as part of the "basic tools of an adequate defense." *Id.* at 925.

A.

[9] Prior to the trial, Weeks filed a motion for expert assistance in the fields of ballistics and pathology and, simultaneously, asked that his motion be treated pursuant to 18 U.S.C.A. § 3006A(e) (West Supp. 1998), which requires that an indigent's request for expert assistance in federal court be treated ex parte. Weeks contended that expert assistance was needed to evaluate the evidence and present a

5. Even if we were to apply the pre-AEDPA standard of de novo review, *see Howard v. Moore*, 131 F.3d 399, 406 (4th Cir.1997) (en banc), *cert. denied*, — U.S. —, 119 S.Ct. 108, 142 L.Ed.2d 86 (1998), we would conclude, for the reasons discussed, that the trial court's actions did not prevent the jury's consideration of mitigating evidence in violation of *Boyde*.

6. Because Weeks frames this issue in his brief in terms of the fairness of the trial he received, we utilize a due process analysis in addressing his claim. *See Moore v. Kemp*, 809 F.2d 702, 709 n. 6 (11th Cir.1987) (en banc).

defense on the issues of premeditation in the guilt phase and vileness in the sentencing phase. Weeks contended that because he must demonstrate to the court why such expert assistance is required, the hearing on the motion should be ex parte to prevent the prosecution from learning the theory of the defense. After hearing argument of counsel, the trial court entered an order of September 28, 1993, denying both the motion and Weeks's request for an ex parte hearing on the motion.

On direct appeal, Weeks raised numerous assignments of error. In his 11th assignment of error, Weeks argued that the trial court erred by denying his application to be heard ex parte on his motion for expert assistance in the fields of pathology and ballistics. In his 12th assignment of error, Weeks argued that the trial court erred by denying his motion for expert assistance in the field of pathology and ballistics. The Supreme Court of Virginia declined to grant relief on either claim. *See Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (Va.1994).

[10, 11] The Commonwealth argues that the Supreme Court of Virginia's disposition of Weeks's 12th assignment of error, *i.e.*, his claim for appointment of experts, is not cognizable on federal habeas because it "reached no federal constitutional issue, for the simple reason that Weeks advanced no such claim." (Appellee's Br. at 16–17.) A federal court may grant habeas relief "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a) (West 1994). Therefore, when a petitioner's claim rests solely upon an interpretation of state case law and statutes, it is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Moreover, a federal habeas court cannot hear a petitioner's federal claims unless he has first exhausted state remedies, *see* 28 U.S.C.A. § 2254(b), (c) (West 1994 & Supp. 1998), which requires that the petitioner fairly present the substance of his federal claim to the state courts, *see Duncan v. Henry*, 513 U.S. 364, 365–66, 115 S.Ct. 887, 130 L.Ed.2d 865(1995) (per curiam) (reversing grant of writ of habeas corpus where petitioner, on direct appeal in state court, claimed that evidentiary ruling violated state law but did not claim violation of any federal constitutional right).

Applying these principles to the facts of this case, we find the Commonwealth's argument unpersuasive. Although the Commonwealth correctly noted that the Supreme Court of Virginia did not discuss a federal constitutional issue in addressing Weeks's claim, it is the petitioner's argument to the court rather than the court's decision that is dispositive. Weeks's brief on direct appeal clearly alleged that the denial of expert assistance constituted violations of the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States. Because Weeks presented the substance of a federal constitutional claim for experts to the Supreme Court of Virginia, we may review this claim in a federal habeas proceeding.

B.

[12, 13] Weeks argues that the Supreme Court of Virginia never adjudicated the merits of his claim, and, therefore, this Court must review it de novo. Specifically, Weeks alleges that the Supreme Court of Virginia dismissed his application for an ex parte hearing on his motion for expert assistance in the fields of pathology and ballistics, the 11th assignment of error, without addressing his actual request for such expert assistance, the 12th assignment of error. With regard to these two assignments of error, the Supreme Court of Virginia found the following:

Associated with defendant's claim of error relating to the request for a scien-

tific investigation is the complaint that the trial court erred by denying his request to be heard ex parte on his motion for expert assistance in the fields of pathology and ballistics, and for denial of the request for appointment of such experts. Defendant asked that his motion for funding for expert assistance "be treated under the same procedure as required by Title 18 USC 3006A(e) in Federal Court." There is no merit to this contention.

We already have decided that a defendant charged with capital murder is not entitled to an ex parte hearing on his motion for expert assistance. *Ramdass v. Commonwealth*, 246 Va. 413, 422, 437 S.E.2d 566, 571 (1993), *rev'd on other grounds sub nom. Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). In addition, we specifically have refused to apply the federal statute to state capital murder prosecutions.

Weeks, 450 S.E.2d at 388. Weeks's claim rests on the arguable point that when the Supreme Court of Virginia stated that "[t]here is no merit to this contention," the singular term "this contention" only referred to Weeks's application for an ex parte hearing and not to his claim for experts. Weeks's interpretation is supported by the preceding sentence, in which the Supreme Court of Virginia ruled that Weeks asked that his request for an ex parte hearing be treated under the same procedure as required by 18 U.S.C.A. § 3006A(e). Weeks's argument is also supported by the subsequent paragraph, in which the Supreme Court of Virginia exclusively discussed Weeks's application to be heard ex parte on his motion for expert assistance. The fact that the state court did not address a petitioner's federal constitutional claim does not render his claim unreviewable on federal habeas if he demonstrates that the state court had a fair opportunity to address the claim. *Cf. Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997) (holding that a federal claim in a state court judgment on which the state court was silent will not be reviewed unless it was properly presented to the state court).

We agree with Weeks and conclude that the Supreme Court of Virginia failed to address his request for expert assistance in the fields of pathology and ballistics on the merits. Thus, we do not apply the standards of review set forth in 28 U.S.C.A. § 2254(d) (West Supp.1998), which requires that a claim be "adjudicated on the merits in State court proceedings." Because Weeks's request for experts requires us to apply a legal standard to a given set of facts, we review his claim de novo.

C.

[14–16] Even though Weeks's claim for expert assistance is not subject to 28 U.S.C.A. § 2254(d), we still must determine whether resolving Weeks's claim for experts in his favor would require this Court to announce a new rule in violation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). *See Green v. French*, 143 F.3d 865, 874 (4th Cir.1998) (holding that antiretroactivity principles of *Teague* apply where limitations of § 2254(d)(1) do not). "Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions."[7] *Penry v. Lynaugh*, 492 U.S. 302, 313, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In general, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. "The principle announced in *Teague* serves to insure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). Thus, a petitioner cannot receive federal habeas relief "unless reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to rule in his favor." *Graham v. Collins*, 506 U.S. 461, 467, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (internal quotation marks omitted).

7. The two exceptions are new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," and "watershed rules of criminal procedure" that significantly improve the accuracy of the factfinding procedure and implicate the fundamental fairness of the trial. *See Teague v. Lane*, 489 U.S. 288, 311–12, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion).

[17] In determining whether a petitioner seeks a new rule on collateral review, a court should proceed in three steps:

> First, the date on which the defendant's conviction became final is determined. Next, the habeas court considers whether "a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by the existing precedent to conclude that the rule [he] seeks was required by the Constitution." If not, then the rule is new. If the rule is determined to be new, the final step in the *Teague* analysis requires the court to determine whether the rule nonetheless falls within one of the two narrow exceptions to the *Teague* doctrine.

O'Dell v. Netherland, 521 U.S. 151, 117 S.Ct. 1969, 1973, 138 L.Ed.2d 351 (1997) (internal citations omitted). Weeks's conviction became final on October 2, 1995, the date the Supreme Court of the United States denied certiorari. We therefore must determine whether as of October 2, 1995, a Virginia state court would have been compelled by existing precedent to conclude that a rule establishing a right to appointment of experts in pathology and ballistics for indigent criminal defendants was required by the Constitution.

[18] Supreme Court precedent establishes the principle that the government, upon request, must provide indigent defendants with the "basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971); *see Douglas v. California*, 372 U.S. 353, 357–58, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Griffin v. Illinois*, 351 U.S. 12, 18–19, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (plurality opinion). Although the government need not purchase for the indigent defendant all the assistance that a wealthier defendant might buy, fundamental fairness requires that indigent defendants have "an adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).[8] In *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court held that as part of the basic tools of an adequate defense, an indigent defendant has a due process right to the appointment of a psychiatrist to assist him in his defense when he "demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." *Id.* at 83. Although there was broad language in *Ake* suggesting application to a variety of circumstances in which an indigent defendant requests expert assistance, its precise holding was limited to the facts at hand. *See id.* at 83. In fact, the Supreme Court soon thereafter declined to extend *Ake*'s holding to the appointment of a criminal investigator, fingerprint expert, and ballistics expert and declined to address the question of "what *if any* showing would [entitle] a defendant to [private non-psychiatric] assistance" as a matter of federal constitutional law. *Caldwell v. Mississip-*

8. Although most of the early Supreme Court decisions in the area of the treatment of indigents in the criminal justice system rested on an equal protection framework, "[d]ue process and equal protection principles converge in the Court's analysis in these cases." *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

pi, 472 U.S. 320, 323 n. 1, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (emphasis added).

We interpret *Ake* and *Caldwell* together to stand for the proposition that due process as of the time Weeks's conviction became final only required that an indigent defendant be appointed psychiatric experts when his sanity is at issue in the trial. Finding in favor of Weeks on his claim therefore would require us to announce a "new rule" of constitutional law in violation of *Teague*. Weeks cites *Husske*, 252 Va. 203, 476 S.E.2d 920, as support for his contention that he is not seeking the announcement of a new rule, but rather the application of an old rule. In *Husske*, the Supreme Court of Virginia noted the following:

> Our research reveals that most courts which have considered the question whether an indigent defendant is entitled to the appointment of a non-psychiatric expert have applied the rationale in *Ake*, and, those courts have held that the Due Process and Equal Protection clauses require the appointment of non-psychiatric experts to indigent defendants depending upon whether the defendants made a particularized showing of the need for the assistance of such experts.

Id. at 925 (citing numerous cases from state and federal courts). The Supreme Court of Virginia continued, "We are of the opinion that *Ake* and *Caldwell*, when read together, require that the Commonwealth of Virginia, upon request, provide indigent defendants with 'the basic tools of an adequate defense,' and, that in certain instances, these basic tools may include the appointment of non-psychiatric experts." *Id.* (internal citation omitted). The Supreme Court of Virginia then held that an indigent defendant may establish an entitlement to appointment of a non-psychiatric expert "by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial." *Id.*

Weeks argues that although the *Husske* decision came out one year after his conviction became final, it provides a good proxy of what the Supreme Court of Virginia would have concluded had it addressed the issue in Weeks's case, and, therefore, application of the *Husske* rule to his case would not involve the application of a "new rule." *See Lambrix v. Singletary*, 520 U.S. 518, 117 S.Ct. 1517, 1529, 137 L.Ed.2d 771 (1997) (holding that case was a "particularly good proxy" for what a reasonable jurist would have thought four years previously, given that the only relevant cases decided in interim were dictated by precedent). We find Weeks's argument to be unpersuasive. The proper inquiry under *Teague* is whether the Supreme Court of Virginia would have been *compelled* by existing precedent at the time that Weeks's conviction became final to hold that Weeks was constitutionally entitled to the appointment of experts in pathology and ballistics, not whether the Supreme Court of Virginia would later be convinced after canvassing cases from other courts that such experts may be required in certain instances. Weeks points to no controlling precedent between *Ake/Caldwell* and *Husske* that would compel the Supreme Court of Virginia to rule in his favor. Neither the mere fact that prior cases lent general support to the conclusion reached in *Husske*, nor Weeks's contention that the Supreme Court of Virginia would have felt compelled (by existing precedent at the time that Weeks's conviction became final) to conclude that the rule he seeks was required by the Constitution, suffices to show that *Husske* was not a new rule. *See Sawyer*, 497 U.S. at 236.

In fact, we have recently indicated that the *Husske* rule is not required by *Ake* and *Caldwell*. In *Gray v. Thompson*, 58 F.3d 59 (4th Cir.1995), this Court considered a habeas petitioner's claim that the Virginia state court's refusal to appoint a private investigator for the defense violated due process. *See id.* at 66. Citing *Caldwell*, we noted that the Supreme Court had flatly declined to resolve the

question of what, if any, showing would entitle an indigent defendant to private non-psychiatric assistance as a matter of federal constitutional law. *See id.* We then concluded that resolving that question "would clearly be breaking new constitutional ground." *Id.* at 66; *see also Jackson v. Ylst*, 921 F.2d 882, 885–86 (9th Cir.1990) (declining to address same question). We see no reason why the holding in *Gray* does not apply to a claim based on a denial of experts in pathology and ballistics. Weeks therefore is requesting this Court to apply the new rule established by *Husske* to his case.

D.

[19] Because Weeks claims the benefit of a new rule, the rule is not applicable to his case unless it falls within one of two narrow exceptions enunciated in *Teague*. Weeks argues that even if *Husske* was a new rule, his request falls under the second exception, which allows retroactive application of a "watershed rule of criminal procedure" that significantly improves the fact finding procedures and implicates the fundamental fairness of the trial. *See Teague*, 489 U.S. at 311. Weeks contends that in light of *Ake* and *Caldwell* it would be fundamentally unfair to conclude that psychiatrists are a basic tool of an adequate defense while non-psychiatric experts are not. In support of his argument, Weeks cites numerous cases in which this Court and others have recognized that due process may entitle an indigent defendant to receive the services of court-appointed independent non-psychiatric experts on request.

We find Weeks's argument to be unpersuasive. Because the second *Teague* exception is directed toward the accurate determination of guilt or innocence, it is "unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313. This Court has recognized that an indigent defendant has a right under the due process clause to the assistance of an expert if a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance. *See Williams v. Martin*, 618 F.2d 1021, 1027 (4th Cir.1980). *Williams* concerned the refusal of the trial court to furnish the defendant with an independent pathologist to serve as an expert witness concerning the cause of the victim's death. *See id.* at 1026. Because there is no doubt as to the cause of Trooper Cavazos's death, we believe that Weeks's claim does not present the "substantial issue" necessary to invoke the *Williams* rule. *See George v. Angelone*, 901 F.Supp. 1070, 1084–85 & n. 8 (E.D.Va.1995) (following *Gray* and holding that petitioner is not entitled as a matter of due process to private investigator to assist defense in countering Government's "vileness" case at sentencing phase). Moreover, because the *Husske* rule recognizing a federal constitutional right to non-psychiatric experts in Virginia state cases upon a particularized showing of such need adds to an existing guarantee of due process, it is not an "absolute prerequisite to fundamental fairness" of the type required by *Teague*'s second exception. *Sawyer*, 497 U.S. at 244.

In sum, we hold that although Weeks's claim for experts in pathology and ballistics was not adjudicated by the state courts, finding a federal constitutional right to such experts upon a particularized showing of need would require us to apply a "new rule" in violation of *Teague*.[9]

9. The relevant standard of review under the AEDPA is even more stringent than *Teague*, because under the AEDPA, a writ will not issue unless a state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C.A. § 2254(d) (West Supp. 1998) (emphasis added). It necessarily follows that if a decision resolving this claim in Weeks's favor is impermissible under *Teague*, such a decision is also impermissible under § 2254(d).

V.

[20] Weeks also argues that the trial court violated his Fifth Amendment right against self-incrimination by refusing to suppress the confession he made to Agent Rowland at the second interrogation. Specifically, Weeks alleges that Agent Rowland's second interrogation failed to "scrupulously honor" Weeks's right to cut off questioning in violation of *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Furthermore, Weeks claims that the constitutional error of introducing his statements made at the second interrogation had a "substantial and injurious effect or influence in determining the jury's verdict." (Appellant's Br. at 24–25.)

The relevant circumstances surrounding Weeks's confession are as follows. At 7:40 a.m. on February 24, 1993, Weeks was read his *Miranda* rights by Agent Rowland, who had become suspicious of him during their conversation. Weeks invoked his right to remain silent and questioning immediately ceased. Upon learning several minutes later that the driver of the car in which Weeks was traveling had identified Weeks as the shooter of Trooper Cavazos, Rowland placed Weeks under arrest. Weeks was then taken before a magistrate and then to the Adult Classification Center in Manassas. Later that morning, in response to routine questions about his physical and mental state from classification officers in the jail, Weeks indicated that he was considering suicide because he had shot the trooper. At approximately 6:00 p.m., Weeks was brought to the lounge of the local prosecutor's office where Rowland again interviewed him. Rowland asked Weeks whether he remembered the rights Rowland had read to him earlier in the day and Weeks answered affirmatively. Rowland proceeded to summarize the evidence against Weeks. At the end of his summary, Rowland told Weeks, "This is your opportunity to provide your explanation as to what happened at the shooting scene." *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 385 (1994). Weeks replied that he was "packing" a firearm and then confessed to Trooper Cavazos's murder.

In *Mosley*, the Supreme Court addressed an issue left open by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)—the circumstances, if any, under which resumption of questioning is permissible after a person in custody has indicated that he wishes to remain silent. *See Mosley*, 423 U.S. at 100–02. Rejecting an interpretation of *Miranda* that would "create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent," *id.* at 102–03, the Supreme Court concluded "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored,'" *id.* at 104. The Supreme Court set forth the following list of factors for a court to consider in making this inquiry: (1) whether the police had given the suspect *Miranda* warnings at the first interrogation and the suspect acknowledged that he understood the warnings; (2) whether the police immediately ceased the interrogation when the suspect indicated that he did not want to answer questions; (3) whether the police resumed questioning the suspect only after the passage of a significant period of time; (4) whether the police provided a fresh set of *Miranda* warnings before the second interrogation; and (5) whether the second interrogation was restricted to a crime that had not been a subject of the earlier interrogation. *See id.* at 104–07.

[21] Weeks argues that his second interrogation was in violation of *Mosley* because his interrogators violated three of the *Mosley* factors: a significant amount of time had not passed between interrogations, no new *Miranda* warnings were given, and the second interrogation concerned the same crime that was the subject of the

first interrogation. Insofar as Weeks suggests that the failure to satisfy certain factors is dispositive of whether a *Mosley* violation has occurred, we disagree. *Mosley* does not prescribe a bright-line test to determine whether a suspect's right to cut off questioning was "scrupulously honored." Instead, the touchstone is whether a "review of the circumstances" leading up to the suspect's confession reveals that his "right to cut off questioning was fully respected." *Mosley*, 423 U.S. at 104; *see also United States v. Schwensow*, 151 F.3d 650, 659 (7th Cir.1998); *United States v. Alvarado-Saldivar*, 62 F.3d 697, 699 (5th Cir.1995).

Applying the *Mosley* factors to Weeks's case, we cannot conclude that the Supreme Court of Virginia's decision to uphold the trial court's admission of Weeks's confession was contrary to or an unreasonable application of *Mosley*. The first factor in the *Mosley* analysis is whether the suspect was advised before the initial interrogation that he had the right to remain silent. The second factor is whether there was an immediate stoppage of questioning once the suspect asserted his right to remain silent. In this case, it is undisputed that Weeks received full *Miranda* warnings during his first interrogation by Agent Rowland and that questioning ceased immediately once Weeks invoked his right to cut off questioning.

[22] The third factor in the *Mosley* analysis is whether the police waited a significant period of time after the suspect's initial invocation of his right to remain silent before questioning the suspect again. A significant period of time between interrogations does not require a durational minimum. *Compare United States v. Cody*, 114 F.3d 772, 775–76 (8th Cir.1997) (holding that three hours was significant amount of time) *with United States v. Barone*, 968 F.2d 1378, 1385 (1st Cir.1992) (holding that more than twenty-four hours was insufficient where police repeatedly pressured suspect to cooperate). Instead, a "significant period of time" is a function of to what degree the police "persist[ed] in repeated efforts to wear down [the suspect's] resistance and make him change his mind." *Mosley*, 423 U.S. at 105–06. In this case, over ten hours passed between the time when Weeks invoked his right to cut off questioning and the second interrogation, during which time Weeks was asked routine questions about his physical and mental state but was not subjected to repeated efforts to wear down his resistance. It was reasonable for the Supreme Court of Virginia to conclude that this period of time was sufficient. *See Mosley*, 423 U.S. at 104–06 (considering two hours to be a "significant period of time").

The fourth factor in the *Mosley* analysis is whether the suspect received a fresh set of *Miranda* warnings prior to the second interrogation. In this case, Agent Rowland admittedly did not reinform Weeks of his right to remain silent prior to the second interrogation. Agent Rowland did, however, ask Weeks whether he remembered the rights he had been read from the first interrogation, and Weeks responded that he did. Weeks then proceeded to confess voluntarily to the trooper's murder. The fact that incomplete *Miranda* warnings, or no warnings at all, are given prior to the second interrogation is not decisive. *See, e.g., United States v. Andrade*, 135 F.3d 104, 106–07 (1st Cir. 1998) (finding no *Mosley* violation where officer asked suspect whether he remembered rights that were read to him earlier and suspect answered in affirmative); *Kelly v. Lynaugh*, 862 F.2d 1126, 1131 (5th Cir.1988) (finding that failure to give new *Miranda* warnings did not establish *Mosley* violation because in light of two oral warnings and one written warning given earlier, it would be difficult to conclude that suspect had forgotten his *Miranda* rights); *Stumes v. Solem*, 752 F.2d 317, 319–22 (8th Cir.1985) (finding that failure to give new *Miranda* warnings did not establish *Mosley* violation because suspect's conduct indicated that he was aware

of his *Miranda* rights). This principle is particularly apt here, as Weeks apparently was aware of his *Miranda* rights and voluntarily chose not to exercise them. *See Andrade*, 135 F.3d at 106-07; *Stumes*, 752 F.2d at 321. The fact that Weeks spoke to an officer to whom he had previously asserted his right to cut off questioning further indicates that he was comfortable in exercising this right and that his decision not to exercise this right was the product of volition rather than of coercion.

[23] The fifth factor in the *Mosley* analysis is whether the second interrogation concerned a crime that was the subject of the first interrogation. In this case, both interrogations concerned the same crime—the murder of Trooper Cavazos. Where other factors indicate that a defendant's right to cut off questioning was "scrupulously honored," however, the mere fact that a second interrogation involves the same crime as the first interrogation does not necessarily render a confession derived from the second interrogation unconstitutionally invalid under *Mosley*. *See, e.g., Schwensow*, 151 F.3d at 659 ("[T]he constitutionality of a subsequent police interview depends not on its subject matter but rather on whether the police, in conducting the interview, sought to undermine the suspect's resolve to remain silent."); *Hatley v. Lockhart*, 990 F.2d 1070, 1074 (8th Cir.1993) ("[A] second interrogation is not rendered unconstitutional simply because it involves the same subject matter discussed during the first interview."); *United States v. Hsu*, 852 F.2d 407, 410 (9th Cir.1988) (noting that under flexible *Mosley* approach, "an identity of subject matter in the first and second interrogations is not sufficient, in and of itself, to render the second interrogation unconstitutional").

In sum, under the totality of the circumstances, it was reasonable for the Supreme Court of Virginia to conclude that the police "scrupulously honored" Weeks's right to cut off questioning. The record before us clearly demonstrates that the Supreme Court of Virginia's decision upholding the trial court's admission of Weeks's confession derived from the second interrogation was neither contrary to *Mosley* nor an application or interpretation of *Mosley* "that reasonable jurists would all agree [wa]s unreasonable." *Green v. French*, 143 F.3d 865, 870 (4th Cir.1998).[10]

VI.

[24-26] Next, Weeks argues that the district court erred in holding that several of his claims were procedurally defaulted. Under the well-established doctrine of procedural default, a federal habeas court may not review a claim that a state court has found to be clearly and expressly defaulted under an independent and adequate state procedural rule unless the prisoner can demonstrate cause for the default and prejudice resulting therefrom or demonstrate that a failure to consider the claims will result in a fundamental miscarriage of justice.[11] *See Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115

10. Even if we were to apply the pre-AEDPA standard of de novo review, *see Howard v. Moore*, 131 F.3d 399, 406 (4th Cir.1997) (en banc), *cert. denied*, — U.S. —, 119 S.Ct. 108, 142 L.Ed.2d 86 (1998), we would conclude, for the reasons discussed, that Weeks has failed to show that the police did not "scrupulously honor" his right to cut off questioning under *Mosley*.

11. Under the "miscarriage of justice" doctrine, a writ may be granted even without a showing of cause if a constitutional violation has probably resulted in the conviction of someone who is actually innocent. *See Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397(1986). In a capital case, to show "actual innocence" of the death penalty, a petitioner must show by clear and convincing evidence that but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty. *See Sawyer v. Whitley*, 505 U.S. 333, 348, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Before this Court, Weeks has not argued that our refusal to address his procedurally defaulted claims would result in a "miscarriage of justice." Accordingly, we do not address the "miscarriage of justice" exception.

L.Ed.2d 640 (1991); *Harris v. Reed*, 489 U.S. 255, 262, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). A state rule is adequate if it is "firmly established," *James v. Kentucky*, 466 U.S. 341, 348, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984), and regularly and consistently applied by the state court, *see Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), and is independent if it does not "depend[ ] on a federal constitutional ruling," *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

A.

[27] First, Weeks asserts that the district court erred when it determined that Claims IV and XXIV were procedurally defaulted. On direct appeal, the Supreme Court of Virginia ruled that it would not address Weeks's assignment of errors 10 and 36 because Weeks failed to register these objections at trial as required by Rule 5:25 of the Rules of the Supreme Court of Virginia.[12] *Weeks v. Commonwealth*, 450 S.E.2d 379, 388, 389 (Va.1994). Weeks subsequently raised these objections in his federal habeas petition as Claims IV and XXIV. The district court found these claims to be procedurally defaulted under Rule 5:25. *Weeks v. Angelone*, 4 F.Supp.2d 497, 515 (E.D.Va.1998).

Weeks does not dispute that these claims are procedurally defaulted under Rule 5:25, but he now argues that Rule 5:25 is not an adequate state procedural bar because it is not regularly and consistently applied by the Virginia state courts. As support for this contention, Weeks cites several Virginia state cases that allegedly demonstrate that Virginia courts have often strayed from the contemporaneous objection rule.

We find this argument to be without merit. As a general matter, an unambiguous court rule such as Rule 5:25 is necessarily "firmly established." *See O'Dell v. Netherland*, 95 F.3d 1214, 1241 (4th Cir. 1996) (en banc). Moreover, contrary to Weeks's assertion on appeal, the Supreme Court of Virginia has regularly and consistently applied Rule 5:25 in recent years. *See, e.g., Fairfax Hosp. v. Curtis*, 492 S.E.2d 642, 648 (Va.1997); *Angstadt v. Atlantic Mut. Ins. Co.*, 492 S.E.2d 118, 121 (Va.1997); *Hughes v. Cole*, 251 Va. 3, 465 S.E.2d 820, 831 (Va.1996); *see also Bennett v. Angelone*, 92 F.3d 1336, 1345 n. 7 (4th Cir.1996) ("Normally, the Virginia Supreme Court will not review errors not preserved by contemporaneous objection."). The mere recitation of a few cases in which the Supreme Court of Virginia has not applied Rule 5:25 is insufficient to show that Rule 5:25 is not consistently or regularly applied because "[c]onsistent or regular application of a state rule of procedural default does not require that the state court show an undeviating adherence to such rule admitting of *no* exception, when the state procedural rule has, as a general rule, ... been applied in the vast majority of cases." *Yeatts v. Angelone*, 166 F.3d 255, 263-64 (4th Cir.1999) (internal quotation marks and citations omitted); *accord Smith v. Dixon*, 14 F.3d 956, 972 (4th Cir.1994). Weeks therefore fails to establish that Rule 5:25 is not an independent and adequate state procedural bar precluding review of errors he did not raise at trial.

B.

Next, Weeks claims that the district court erred when it determined that Claims II, III, VI, VIII, XVII, XXI, and XXIII were procedurally defaulted. On direct appeal, Weeks filed a ninety-page brief that raised forty-seven errors. He moved for leave to file an oversized brief pursuant to Rule 5:26. The Supreme Court of Virginia denied Weeks's motion

12. Rule 5:25 provides: "Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Va. Sup.Ct. R. 5:25 (Michie 1998).

and ordered him to file a fifty-page brief.[13] Due to the space limitation, Weeks deleted the arguments supporting ten claims of federal constitutional error. The Supreme Court of Virginia refused to consider these ten claims (nos. 4, 5, 6, 7, 8, 17, 26, 31, 38, and 39) for failure to brief or argue the errors. *Weeks*, 450 S.E.2d at 383 (citing *Jenkins v. Commonwealth*, 244 Va. 445, 423 S.E.2d 360, 364 (1992)). Weeks subsequently raised seven of these claims in his federal habeas petition as Claims II, III, VI, VIII, XVII, XXI, and XXIII. The district court found these claims to be procedurally defaulted for failure to brief them on direct appeal. *Weeks*, 4 F.Supp.2d at 515–17.

Weeks now argues that the state rule preventing consideration of claims not briefed on direct appeal does not constitute an adequate and independent state bar because the fifty-page limitation physically prevented him from presenting these claims. In the alternative, Weeks argues that even if the rule is an adequate and independent state procedural bar, he has shown cause and prejudice to overcome the bar because the Supreme Court of Virginia's refusal to deviate from its fifty-page limit even when it was on notice that Weeks needed more than fifty pages to present his arguments was an "objective factor external to the defense" that impeded Weeks's ability to comply with the state procedural rule. Weeks also argues that by proffering the defaulted claims in his original oversized brief, he satisfied the exhaustion requirement for the purposes of federal proceedings and that further presentation of these claims was not required because the fifty-page limitation rendered the state appellate process ineffective to protect his rights. We address these arguments in turn.

1.

[28] First, Weeks argues that the state procedural bar preventing consideration of claims not briefed on direct appeal was not adequate and independent because the fifty-page brief limit physically prevented him from presenting all forty-seven assigned errors to the Supreme Court of Virginia. In support of this argument, Weeks cites *Reese v. Peters*, 926 F.2d 668 (7th Cir.1991). In *Reese*, state law prevented the petitioner from raising several claims in post-conviction proceedings in state court. *See id.* at 670. On federal habeas review, the district court deemed these claims to be forfeited. *See id.* The Seventh Circuit stated that "[w]hen state law does not allow the prisoner to present a particular claim, the omission—submitting to limitations established by law—is not an independent and adequate state ground precluding federal review." *Id.* The Seventh Circuit concluded, however, that because the petitioner did not present the claims on direct appeal from his conviction, he forfeited the claims on collateral review. *See id.* at 671.

Reese cuts against Weeks's argument rather than supporting it. Much like the petitioner in *Reese*, Weeks voluntarily withdrew the arguments supporting several claims on direct appeal. The fifty-page limit merely limited the manner in which Weeks could present his arguments; it did not wholly prevent him from presenting them. Moreover, the Supreme Court of Virginia has regularly and consistently refused to consider claims not briefed or argued on direct appeal. *See, e.g., Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380, 385 (1992); *Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218, 222 (1991); *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385, 390 (1990). The state procedural rule that deems arguments not briefed to be waived is therefore an adequate and independent state bar.

2.

[29, 30] Second, Weeks argues that even if the state procedural bar was adequate and independent, cause and prejudice existed for his default. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's effort to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Weeks argues that the fifty-page limit imposed by the Supreme Court of Virginia was itself an "objective factor external to the defense" that impeded his effort to comply with the state procedural rule.

We find this argument unpersuasive. While the page limitation may have led Weeks's counsel to make certain strategic choices as to which arguments to include and which to omit, the page limitation is reasonable.[14] It would be nonsensical to hold that the fifty-page limit, which is itself a reasonable and consistently applied state procedural rule, could constitute cause for failure to adhere to another state procedural rule that deems issues not briefed on direct appeal to be waived. The fifty-page limit therefore did not constitute cause for Weeks's failure to comply with the state procedural rule requiring litigants to brief issues on appeal in order to preserve them.

3.

[31, 32] Finally, Weeks argues that by presenting the defaulted claims in his original oversized brief, he satisfied the exhaustion requirement for purposes of federal proceedings. Weeks also argues that further presentation of these claims was not required because circumstances existed that rendered the state appellate process ineffective to protect his rights. *See* 28 U.S.C.A. § 2254(b)(1)(B)(ii) (West Supp. 1998). It appears that Weeks is conflating the related concepts of exhaustion and procedural default.[15] Both parties, the district court, and we agree that Weeks's claims have been exhausted. The issue, however, is whether these claims are defaulted by Weeks's failure to brief them on direct appeal, and, if so, whether there is cause for and prejudice resulting from Weeks's default. As we concluded above, the state rule preventing consideration of claims not briefed on direct appeal is an adequate and independent state bar, and the fifty-page limit does not constitute cause for defaulted claims not presented on appeal. Weeks therefore fails to show that the state procedural rule barring review of claims not briefed on appeal is not an adequate and independent state bar precluding review of the claims he chose not to present to the Supreme Court of Virginia in his fifty-page brief.

C.

[33] Finally, Weeks claims that the district court erred when it determined that his ineffective-assistance-of-trial-counsel claims were procedurally defaulted. As of July 1, 1995, prisoners under a sentence of death were required to comply with a statute of limitations for filing habeas petition and were limited to filing an original petition in the Supreme Court of Virginia. *See* Va.Code Ann. § 8.01-654.1 (Michie Supp.1998); Va. Sup.Ct. R.

13. Rule 5:26(a) provides: "Except by permission of a justice of this Court, neither the opening brief of appellant, nor the brief of appellee, nor a brief amicus curiae shall exceed 50 typed or 36 printed pages." Va.Sup. Ct. R. 5:26(a) (Michie 1998).

14. The United States Supreme Court limits opening briefs to 50 pages. *See* U.S. S.Ct. R. 33.1(g).

15. "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997). "A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture." *George v. Angelone*, 100 F.3d 353, 363 (4th Cir.1996). Thus, the exhaustion requirement is also satisfied when a state procedural rule would bar consideration of the unexhausted claim if the claim was presented to the state court. *See Matthews*, 105 F.3d at 911 (citing *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). A claim is procedurally defaulted when it is rejected by a state court on an adequate and independent state procedural ground. *See Coleman*, 501 U.S. at 750

5:7A(a) (Michie 1998).[16] (J.A. at 517–20). Weeks's state habeas counsel erroneously filed Weeks's habeas petition in the Circuit Court for Prince William County. On December 1, 1995, the date on which Weeks's state habeas petition was due in the Supreme Court of Virginia, habeas counsel withdrew the petition and mailed it to the Supreme Court of Virginia by regular mail. The Supreme Court of Virginia received the petition on December 4, 1995.[17] On March 15, 1996, the Supreme Court of Virginia granted the Commonwealth's motion to dismiss Weeks's petition as untimely, and, therefore, jurisdictionally barred. The district court found Weeks's ineffective-assistance-of-trial-counsel claims to be procedurally defaulted due to the untimely filing of his state habeas petition. *Weeks*, 4 F.Supp.2d at 510–11.

In Virginia, claims of ineffective assistance of trial counsel generally must be presented on collateral review rather than direct appeal. *See Roach v. Commonwealth*, 251 Va. 324, 468 S.E.2d 98, 105 n. 4 (1996). Weeks does not dispute that the untimely filing of his state habeas petition constitutes an independent and adequate state bar to the consideration of his ineffective-assistance-of-trial-counsel claims on federal habeas, but he now argues that cause and prejudice exist to excuse his defaults. Specifically, Weeks alleges that the defaults resulted from the clear conflict of interest under which his court-appointed state habeas attorney labored: the attorney had previously represented at trial another capital defendant, who was subsequently represented on state habeas by Weeks's former trial attorney. As support for his contention that such a conflict constitutes "cause," Weeks cites Legal Ethics Opinion (LEO) No. 1665, issued on April 1, 1996, by the Virginia State Bar, which condemned such "cross appointments" because each counsel "was expected to zealously advocate petitioner's claims of ineffective assistance of counsel ... while simultaneously defending himself against substantially similar claims."

[34] Ineffective assistance of counsel may constitute "cause" for a procedural default under certain circumstances. *Murray*, 477 U.S. at 488. For an attorney error to constitute cause, however, a petitioner must first possess a constitutional right to assistance of counsel. *See Coleman*, 501 U.S. at 752. This Court has recently held that a petitioner has no constitutional right to assistance of counsel in state habeas proceedings, even though claims of ineffective assistance of trial counsel can only be raised on state collateral review. *See Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir.1997) (en banc), *cert. denied*, — U.S. —, 118 S.Ct. 907, 139 L.Ed.2d 922 (1998). In an attempt to avoid the binding precedent of *Mackall*, Weeks argues that he possesses a liberty interest in conflict-free habeas representation that is protected under the due process clause of the Fourteenth Amendment based on his statutory right to counsel under Va.Code Ann. § 19.2–163.7 (Michie 1995).[18] Weeks further contends that the actions of his conflicted state habeas counsel in failing to observe the jurisdictional rules in filing his state habeas petition and in failing to withdraw after the Virginia State Bar issued LEO No. 1665, and of the state courts in appointing conflicted counsel, constituted violations of his due process rights.

[35] Although Weeks characterizes the conduct of his state habeas counsel as "outrageous," at the district court level he relied on the same set of facts in making his Sixth Amendment claim of ineffective assistance of habeas counsel as his Fourteenth Amendment due process claim. We thus view his argument as an attempt to shoehorn a claim of ineffective assistance of counsel into a due process claim. We agree with the Ninth Circuit's reasoning in *Bonin v. Calderon*, 77 F.3d 1155 (9th Cir.1996), which denied a due process claim nearly identical to Weeks's:

> [The petitioner] essentially argues that the Fourteenth Amendment violation *is* his ineffective assistance of counsel.... [W]e now hold that ineffective assistance of counsel in habeas corpus proceedings does not present an independent violation of the Sixth Amendment enforceable against the states through the Due Process Clause of the Fourteenth Amendment. To recognize such a claim would allow the Fourteenth Amendment to "swallow the rule" that there is no constitutional right to effective assistance of counsel in habeas corpus proceedings.

Id. at 1160; *see also Smith v. Angelone*, 111 F.3d 1126, 1133 n. 4 (4th Cir.1997) ("We have never held that a prisoner may claim a due process violation based upon his lawyer's performance on state habeas ...."), *cert. denied*, 521 U.S. 1131, 118 S.Ct. 2, 138 L.Ed.2d 1036 (1997). Under the persuasive reasoning of *Bonin*, a petitioner may claim a due process violation occurring in his state habeas proceeding, but he may not premise this claim solely on the alleged ineffective assistance of state habeas counsel. Because Weeks's due process claim is the same as his claim of ineffective assistance of habeas counsel and this Court does not recognize a constitutional right to counsel on state habeas, the alleged ineffective assistance of habeas counsel cannot constitute cause to excuse Weeks's defaulted ineffective-assistance-of-trial-counsel claims.

VII.

In conclusion, for the reasons discussed above, we hold that Weeks has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C.A. § 2253(c)(2) (West Supp.1998). We therefore deny his application for a certificate of appealability and dismiss his petition.

DISMISSED.

16. Section 8.01–654.1 provides: "No petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after ... denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal." Va.Code. Ann. § 8.01–654.1 (Michie Supp.1998). Rule 5:7A(a) provides: "A petition for a writ of habeas corpus shall be filed in the office of the clerk of this Court within 60 days after ... the denial by the Supreme Court of the United States of a petition for a writ of certiorari to the judgment of this Court on direct appeal." Va. Sup.Ct. R. 5:7A(a) (Michie 1998).

17. Had Weeks's state habeas petition been mailed by registered or certified mail, rather than by ordinary mail, it would have been deemed timely. *See* Va. Sup.Ct. R. 5:5(b) (Michie 1998).

18. Section 19.2–163.7 of the Virginia Code provides that following the affirmance of a death sentence on appeal to the Supreme Court of Virginia, the circuit court shall appoint counsel to represent an indigent prisoner in a state habeas proceeding. *See* Va.Code Ann. § 19.2–163.7 (Michie 1995).

KEY NUMBER SYSTEM

In re Abdulaziz Salem TAMIMI, Debtor-in-possession.

Saudi Arabian Airlines Corporation, Garnishee–Appellant,

v.

Sharon L. Tamimi, Creditor–Appellee.

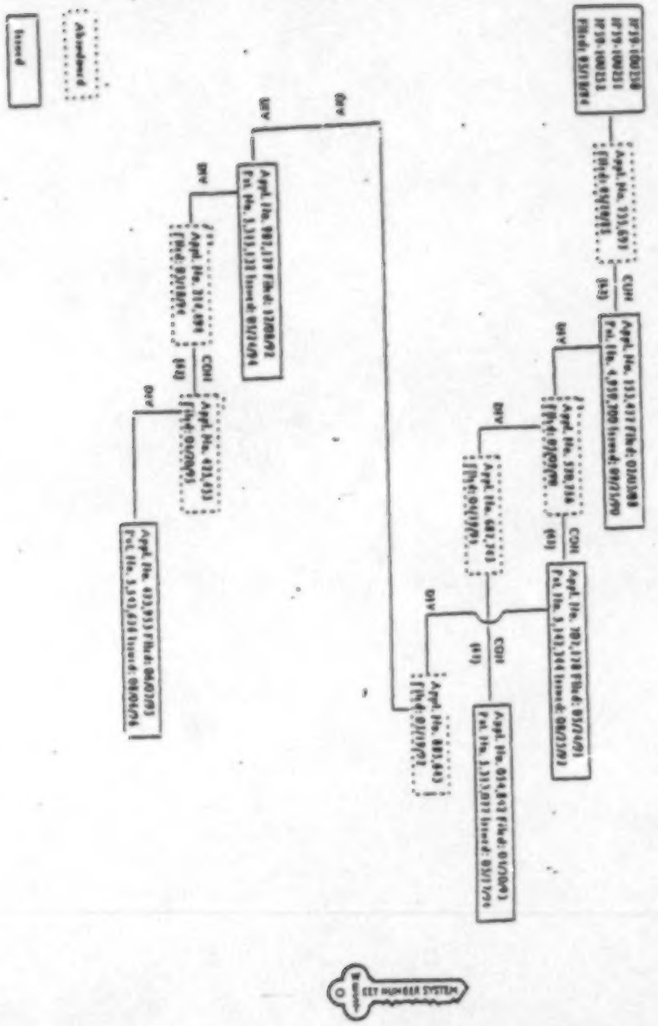
No. 98–1423.

United States Court of Appeals, Fourth Circuit.

Argued Jan. 27, 1999.

Decided May 21, 1999.

Employee's ex-wife brought garnishment action in state court against employer, the Saudi Arabian Airlines Corporation, seeking to recover child support arrearages. Employer, as garnishee, removed ac-



USP 5,543,636

Lonnie WEEKS, Jr., Petitioner,

v.

Ronald J. ANGELONE, Director of the Virginia Department of Corrections, Respondent.

Action No. 2:96CV829.

United States District Court, E.D. Virginia, Norfolk Division.

April 1, 1998.

Order Denying Motion to Amend Judgment, June 19, 1998.

Defendant petitioned for federal habeas relief after his conviction of capital murder of state trooper was affirmed on appeal, 248 Va. 460, 450 S.E.2d 379. The District Court, Rebecca Beach Smith, J., held that: (1) Virginia did not meet the "opt-in" requirements for its proceedings to be accorded special deference by federal habeas court under the Antiterrorism and Effective Death Penalty Act (AEDPA); (2) section of the AEDPA, limiting evidentiary hearings in federal habeas proceedings, did not eliminate "actual innocence of the death penalty" doctrine as gateway for petitioner to have his defaulted claims reviewed by habeas court; (3) petitioner failed to establish "cause and prejudice" or "miscarriage of justice," of kind that would permit federal habeas review of his procedurally defaulted claims; (4) petitioner was not entitled to appointment of forensic and ballistic experts who assist him in presenting habeas corpus claim; (5) petitioner had no constitutional right to bill of particulars; and (6) state trial judge's penalty phase instructions were not contrary to, or an unreasonable application of, federal law.

Petition denied and dismissed.

Motion to alter or amend denied.

1. Habeas Corpus ⇐332.1

Virginia's failure to provide comprehensive mechanism for appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings prevented it from qualifying as "opt-in" state, whose proceedings would be entitled to greater deference on federal habeas review under the Antiterrorism and Effective Death Penalty Act (AEDPA). Antiterrorism and Effective Death Penalty Act of 1996, § 107, 110 Stat. 1214.

2. Habeas Corpus ⇐332.1

State must strictly, rather than just substantially, comply with eligibility requirement imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA), that it provide mechanism for appointment and compensation of competent counsel in state post-conviction proceedings, in order to qualify as "opt-in" state whose proceedings will be entitled to greater deference on federal habeas review. Antiterrorism and Effective Death Penalty Act of 1996, § 107, 110 Stat. 1214.

3. Habeas Corpus ⇐401

Section of the Antiterrorism and Effective Death Penalty Act (AEDPA), limiting federal habeas courts ability to hold evidentiary hearing to allow petitioner to develop factual basis of claim, did not eliminate the "actual innocence of the death penalty" doctrine as gateway for petitioner, in "non-opt-in" state, to have his procedurally defaulted claim reviewed. 28 U.S.C.A. § 2254(e)(2).

4. Habeas Corpus ⇐377

Section of the Antiterrorism and Effective Death Penalty Act (AEDPA), limiting federal habeas courts ability to hold evidentiary hearing to permit petitioner to develop factual basis of claim, applied only where the flawed fact-finding in state court was somehow attributable to petitioner; statute did not apply where petitioner had attempted, but been denied opportunity, to develop facts by state courts. 28 U.S.C.A. § 2254(e)(2).

5. Habeas Corpus ⇐401, 404

Generally, procedurally defaulted claims are not reviewable on petition for federal habeas relief, unless petitioner can show either cause and prejudice for his default, or that a failure to hear claims would constitute miscarriage of justice.

6. Habeas Corpus ⇐401

To meet the "miscarriage of justice" exception to proscription against review of procedurally defaulted claims, habeas petitioner must show that constitutional violation has probably resulted in the conviction of one who is actually innocent.

7. Habeas Corpus ⇐401, 431

Habeas petitioners who have been sentenced to death may invoke the "miscarriage of justice" exception to proscription against review of procedurally defaulted claims, even if they are not able to show that constitutional violation has probably resulted in conviction of one who is actually innocent, by demonstrating through clear and convincing evidence that, but for constitutional error, no

reasonable juror would have found petitioner eligible for death penalty.

8. Habeas Corpus ⇐422

Dismissal for untimeliness of state habeas petition was adequate and independent state bar to federal habeas review of petitioner's claims, where newly enacted statute of limitations pursuant to which state petition was dismissed clearly and unambiguously required dismissal unless petition was filed within 60 days after denial of petition for writ of certiorari. Va.Code 1950, § 8.01–654.1.

9. Habeas Corpus ⇐403

State procedural rule pursuant to which federal habeas petitioner's claims were dismissed in state court is not sufficient to preclude federal habeas review on merits, unless state rule was both firmly established and regularly applied.

10. Habeas Corpus ⇐422

As general matter, procedural rules derived from unambiguous state statutes and Supreme Court rules are necessarily "firmly established." for purpose of deciding whether dismissal pursuant to state rule will constitute an adequate and independent state bar to federal habeas review.

See publication Words and Phrases for other judicial constructions and definitions.

11. Criminal Law ⇐641.13(7)

Habeas Corpus ⇐406

Habeas petitioner did not have constitutional right to effective assistance of counsel at state post-conviction proceedings, not even for purpose of presenting claims that, as matter of law, could not have been raised on direct appeal; accordingly, alleged ineffective assistance of state post-conviction counsel did not constitute "cause" for petitioner's procedural default in state court, and did not permit review of petitioner's procedurally defaulted claims under the "cause and prejudice" exception to procedural default rule. U.S.C.A. Const.Amend. 6.

12. Habeas Corpus ⇐406

Attorney error will constitute "cause" for habeas petitioner's procedural default only if, at time of error, petitioner had constitutional right to assistance of counsel. U.S.C.A. Const.Amend. 6.

13. Habeas Corpus ⇐401

Habeas petitioner was not entitled to have his procedurally defaulted ineffective assistance of counsel claims reviewed under the "miscarriage of justice" exception to procedural default rule, on theory that, but for counsel's error, no reasonable juror would have found petitioner eligible for death penalty, where petitioner never explained how counsel's alleged ineffective assistance affected jury's finding as to presence of aggravating factor on which it relied in sentencing him to death. U.S.C.A. Const.Amend. 6.

14. Habeas Corpus ⇐401

To have procedurally defaulted constitutional claim reviewed by federal habeas court under the "miscarriage of justice" exception to procedural default rule, petitioners are required to link their new evidence to the defaulted claim, by showing that it is the claimed error which prevented fact finder from adequately considering evidence at trial.

15. Habeas Corpus ⇐401

"Actual innocence" exception to procedural default rule is grounded on equitable discretion of habeas courts to see that federal constitutional errors do not result in incarceration of innocent persons.

16. Habeas Corpus ⇐442, 452

Habeas court does not sit to correct errors of fact, but to ensure that individuals are not imprisoned in violation of Constitution.

17. Habeas Corpus ⇐422

Dismissal of federal habeas petitioner's claims by Virginia Supreme Court on direct appeal, pursuant to Virginia's contemporaneous objection rule, constituted an adequate and independent state ground upon which federal review could be precluded.

18. Habeas Corpus ⇐403

Dismissal of federal habeas petitioner's claims by Virginia Supreme Court on direct appeal based on his failure to brief or argue alleged errors provided adequate and independent state ground to bar federal review, where petitioner offered no argument that briefing rule was not regularly or consistently applied.

19. Habeas Corpus ⇐405.1

Fifty-page limit on briefs filed in the Virginia Supreme Court did not constitute "cause" for federal habeas petitioner's state procedural default in failing to brief or argue certain errors, and did not permit review of errors by federal habeas court under the "cause and prejudice" exception to procedural default rule; actual "cause" of appellate counsel's failure to properly brief particular claims on direct appeal was not this 50-page limit, but strategic choice made by counsel to focus on particular claims.

20. Habeas Corpus ⇐422

Dismissal of federal habeas petitioner's claims on direct appeal by Virginia Supreme Court, on theory that claim impermissibly incorporated by reference a memorandum filed on subject in state trial court, constituted an adequate and independent ground for barring federal habeas review.

21. Habeas Corpus ⇐405.1

Fifty-page limit on briefs filed with the Virginia Supreme Court did not constitute "cause" for habeas petitioner's procedural default in impermissibly attempting to incorporate memorandum by reference, and did not permit review of procedurally defaulted claims under the "cause and prejudice" exception to procedural default rule.

22. Habeas Corpus ⇐313.1

Claims which federal habeas petitioner never raised in state court were procedurally barred, and could not be considered on federal habeas review.

23. Federal Civil Procedure ⇐2544

Party seeking summary judgment has initial responsibility of informing court of basis for his motion, and of identifying those portions of record which he believes demonstrate the absence of genuine issue of material fact; it is only when movant satisfies this preliminary burden that opposing party must come forward and make showing sufficient to establish existence of element essential to that party's case, and on which it will bear burden of proof at trial. Fed.Rules Civ.Proc. Rule 56, 28 U.S.C.A.

24. Criminal Law ⇐1158(1)

Decision whether to appoint experts is pretrial matter, reviewable for clear error. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(9), 21 U.S.C.A. § 848(q)(9).

25. Costs ⇐302.2(2)

Expert assistance is not "reasonably necessary," within meaning of statute governing appointment of experts in criminal cases, where no evidentiary hearing will be held at which expert's testimony could be presented. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(9), 21 U.S.C.A. § 848(q)(9).

See publication Words and Phrases for other judicial constructions and definitions.

26. Costs ⇐302.2(2), 302.4

Federal habeas petitioner was not entitled to appointment of forensic pathologist and ballistics expert to assist him in arguing that state trial judge had improperly denied him the services of forensic and ballistics expert, where state trial judge's decision was not contrary to any clearly established federal law and would not, in any event, have provided basis for federal habeas relief. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(9), 21 U.S.C.A. § 848(q)(9).

27. Habeas Corpus ⇐461

To obtain federal habeas relief on theory that state trial judge violated his due process rights by denying him the services of forensic and ballistics expert, petitioner had to show that state trial judge's decision was contrary to clearly established federal law, and that trial judge's error had substantial and injurious effect or influence in determining jury's verdict. 28 U.S.C.A. § 2254(d).

28. Habeas Corpus ⇐461

State trial judge's denial of indigent capital defendant's request for appointment of forensic and ballistics expert was not contrary to any clearly established federal law,

and did not provide basis for federal habeas relief, where any determination by federal habeas court that defendant was constitutionally entitled to assistance of forensic and ballistics expert would amount to a "new rule" of law. 28 U.S.C.A. § 2254(d).

29. Habeas Corpus ⇐450.1, 452

Summary dismissal by state court of claim reasserted by defendant in his petition for federal habeas relief is an "adjudication on the merits," within meaning of federal statute establishing the standard of review to be applied by federal habeas court in considering claims previously adjudicated on the merit in state court proceedings. 28 U.S.C.A. § 2254(d).

See publication Words and Phrases for other judicial constructions and definitions.

30. Habeas Corpus ⇐452

Federal statute precluding a grant of habeas relief upon any claim adjudicated on the merits in state court, unless state court's decision "was contrary to, or involved in unreasonable application of, clearly established federal law," abrogated the de novo standard of review previously applicable in federal habeas court to claims of legal error, by changing federal court's focus from petitioner's freestanding legal claims themselves to the state court decision addressing those claims. 28 U.S.C.A. § 2254(d).

31. Constitutional Law ⇐55

Habeas Corpus ⇐205

Federal statute precluding a grant of habeas relief with respect to any claim previously adjudicated on merits in state court, unless state court's decision was "contrary to, or involved in unreasonable application of, clearly established federal law," did not unconstitutionally eliminate judicial power of federal judiciary to say what the law was; while statute increased the respect due state decisions, federal habeas courts still had to independently determine whether state court decision was correct under federal law. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 2254(d).

32. Habeas Corpus ⇐452

In determining, as required under review provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), whether state court's previous ruling on claim constitutes an unreasonable application of federal law, federal habeas courts may not rely on their own jurisprudence, but must compare state trial judge's decision to clearly established federal law as determined by the United States Supreme Court; petitioner must be able to point to authoritative decision of the Supreme Court in order to secure writ. 28 U.S.C.A. § 2254(d)(1).

33. Habeas Corpus ⇐452

Even if habeas petitioner shows that state court incorrectly found a claim to be meritless, in that state court's decision was contrary to clearly established federal law, petitioner must still demonstrate, as prerequisite to federal habeas relief, that this proven trial error was not harmless, in that it had substantial and injurious effect or influence in determining jury's verdict. 28 U.S.C.A. § 2254(d).

34. Habeas Corpus ⇐461

Ex parte hearing to which federal defendant is entitled on application for expert assistance is mandated as a matter of federal statutory and not of constitutional law; accordingly, state trial judge's denial of such a hearing to habeas petitioner did not provide basis for federal habeas relief, as not contrary to, or an unreasonable application of, federal constitutional law. 28 U.S.C.A. § 2254(d).

35. Constitutional Law ⇐265

Habeas Corpus ⇐474

Indictment and Information ⇐121.1(2)

Federal habeas petitioner had no liberty interest in receiving a bill of particulars in connection with prosecution of murder charge against him in state court, of kind which might support procedural due process claim; accordingly, state trial judge's denial of defendant's request for bill of particulars was not contrary to, or an unreasonable application of, federal law and did not provide basis for federal habeas relief. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254(d).

36. Habeas Corpus ⇐770

State trial judge's determination that murder defendant had failed to show "cause" for excusal of member of venire whose close relative had been shot to death in course of his duty as police officer was factual finding, which was presumed correct on federal habeas review absent clear and convincing evidence to contrary. 28 U.S.C.A. § 2254(e)(1).

37. Habeas Corpus ⇐496

State trial judge's refusal to give voir dire question requested by capital murder defendant, as to whether venirepersons believe that a sentence of life imprisonment would require defendant to spend the remainder of his life in prison, was not contrary to, or an unreasonable application of, federal law, and did not entitle defendant to federal habeas relief, where trial judge had inquired whether venirepersons would be able to consider voting for sentence less than death, and whether they knew of any reason why they could not sit and render a fair and impartial verdict. 28 U.S.C.A. § 2254(d).

38. Habeas Corpus ⇐496

State trial judge's refusal to allow proposed voir dire questions regarding racial bias, in capital murder case involving black defendant and white victim, was not contrary to, or an unreasonable application of, federal law, and did not provide basis for federal habeas relief, where judge had allowed two questions as to racial bias, as to whether veniremembers would disapprove of member of their family marrying a person of different race and as to whether they believed that persons of African descent were more likely to commit crimes, and disallowed defendant's proposed questions as open-ended, argumentative and ineffectual. 28 U.S.C.A. § 2254(d).

39. Jury ⇐131(6)

Capital defendant accused of interracial crime is entitled to have prospective jurors informed of race of victim and questioned on issue of racial bias.

40. Jury ⇐131(6)

While capital defendant accused of interracial crime is entitled to have prospective jurors questioned on issue of racial bias, trial judge retains discretion as to form and number of questions on subject of race.

41. Habeas Corpus ⇐496

State trial judge's refusal to allow proposed voir dire questions as to venirepersons' possible bias in favor of death penalty was not contrary to, or an unreasonable application of, federal law, and did not provide basis for federal habeas relief, where such questions as trial judge allowed were adequate to identify those venirepersons who would automatically vote for death penalty. 28 U.S.C.A. § 2254(d).

42. Criminal Law ⇐412.1(4)

Arresting officer "interrogated" defendant, subsequent to defendant's invocation of his Fifth Amendment rights, when officer, after summarizing the evidence against defendant, and after falsely indicating that eyewitness had identified defendant as the murderer, remarked that this was defendant's opportunity to provide some explanation as to what had happened at shooting scene; officer's statement was of the sort reasonably likely to elicit an incriminating response, even though it may not have been phrased as a question. U.S.C.A. Const.Amends. 5, 6.

See publication Words and Phrases for other judicial constructions and definitions.

43. Criminal Law ⇐412.1(4)

While focus of court's inquiry, in deciding whether officer's statement is reasonably likely to elicit an incriminating response so as to constitute "interrogation" for purposes of *Miranda*, is not on officer's intent, officer's intent in making statement is not irrelevant to inquiry. U.S.C.A. Const.Amends. 5, 6.

44. Habeas Corpus ⇐490(3)

State trial judge's determination that police officer had not violated defendant's Fifth Amendment rights when, some hours after defendant had exercised his right to cut off police questioning, officer made second inquiry as to circumstances surrounding homicide was not contrary to, or an unreasonable application of, federal law, and did not provide basis for federal habeas relief, where state trial judge analyzed defendant's claim in light of applicable Supreme Court precedent and

compared circumstances of defendant's questioning to the factors found relevant by the Supreme Court in deciding whether suspect's right to cut off questioning has been scrupulously honored. U.S.C.A. Const.Amends. 5, 6; 28 U.S.C.A. § 2254(d).

45. Habeas Corpus ⇐775(2)

Petitioner was not entitled to habeas relief on theory that evidence obtained in violation of his Fourth Amendment rights had been improperly introduced at his trial, absent a showing that state had not provided him with full and fair opportunity to litigate Fourth Amendment issue. U.S.C.A. Const. Amend. 4; 28 U.S.C.A. § 2254(d).

46. Criminal Law ⇐419(2)

State witness' testimony as to threats he had received from defendant's "admirers" was not offered for its truth, but to explain why state witness felt that he needed protection, and did not constitute "hearsay."

47. Witnesses ⇐287(3)

To the extent that defendant may have been prejudiced by allowing state witness to testify on redirect as to threats he had received from defendant's admirers, defendant opened the door to such testimony by cross-examining state witness as to whether he hoped to receive protection from the state; testimony was properly admitted to explain why witness felt that he needed protection.

48. Criminal Law ⇐449.2

Police officer was not improperly allowed to testify as to defendant's lack of credibility, in violation of defendant's constitutional right to fair trial, when state trial judge, over defendant's objection, allowed officer to testify that certain information he had received from defendant's uncle had caused him to doubt defendant's truthfulness; testimony was admitted to show officer's state of mind during his investigation of homicide, and was not comment on defendant's credibility and ultimate culpability. U.S.C.A. Const.Amends. 5, 6, 8, 14.

49. Habeas Corpus ⇐505

Admission into evidence, at penalty phase of capital murder case, of criminal records of defendant's former associates, in order to establish background and environment in which defendant operated his business, was not so prejudicial as to fatally affect sentencing phase of case and to deprive defendant of his constitutional right to fair trial; accordingly, state trial judge's evidentiary ruling did not provide basis for federal habeas relief. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254(d).

50. Habeas Corpus ⇐490(1)

Admissibility of evidence is generally a matter of state law, and in absence of showing that admission of evidence violated some specific constitutional guarantee, federal court can issue writ of habeas corpus on basis of state court's evidentiary ruling only when that ruling violated defendant's right to due process by denying him a fundamentally fair trial. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254(d).

51. Habeas Corpus ⇐499

State trial judge's response, at penalty phase of capital murder case, to question that he received from deliberating jury as to whether life sentence was with possibility of parole, when judge indicated that jurors were not to concern themselves with what might happen to defendant afterwards but to impose such punishment as they felt just under the evidence, was not contrary to, or an unreasonable application of, federal law, and did not provide basis for federal habeas relief. 28 U.S.C.A. § 2254(d).

52. Habeas Corpus ⇐498

State trial judge's refusal of penalty phase instruction requested by capital murder defendant, that jurors could give effect to evidence in mitigation by sentencing defendant to life in prison even if they found one or both of the aggravators, and court's decision to instead give a pattern jury instruction that permitted jury to "fix" defendant's penalty at death if aggravating factor was found, was not contrary to, or unreasonable application of, federal law, and did not entitle defendant to federal habeas relief; while defendant's requested instruction may have been clearer, pattern jury instruction had previously been upheld by the United States Supreme Court and did not violate defendant's right to have jury adequately informed on

effect it could give to mitigating evidence. 28 U.S.C.A. § 2254(d).

53. Criminal Law ⇐796

Restrictions on jury's sentencing determination at punishment phase of capital case must not preclude jury from being able to give effect to mitigating evidence.

54. Habeas Corpus ⇐499

State trial judge's response, at penalty phase of capital case, to question posed by deliberating jury as to whether they could sentence defendant to life in prison even if they found a statutory aggravating factor, which was merely to refer jurors back to pattern jury instruction previously approved by the United States Supreme Court without specifically instructing them on their ability to give effect to mitigating evidence by sentencing defendant to life in prison, was not contrary to, or an unreasonable application of, federal law, and did not entitle defendant to federal habeas relief. 28 U.S.C.A. § 2254(d).

On Motion to Alter or Amend Judgment

55. Indictment and Information ⇐121.1(2)

Virginia statute providing that, in order to assist defendant in filing pretrial suppression or other motions, the trial court "shall," upon motion of defendant, direct the Commonwealth to file bill of particulars did not give criminal defendant an absolute right to bill of particulars on request, but required trial court to order bill of particulars only if, in its discretion, it found that such a bill was necessary to assist defense in filing suppression or other motions. Va.Code 1950, § 19.2-266.2.

56. Constitutional Law ⇐265

Habeas Corpus ⇐474

Indictment and Information ⇐121.1(2)

Even assuming that Virginia statute gave capital murder defendant an absolute right to bill of particulars upon request, state trial judge's violation of that right, in failing to order bill of particulars, was only a violation of state law, and did not rise to level of deprivation of defendant's due process rights, of kind that would provide basis for federal habeas relief. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254(d); Va.Code 1950, § 19.2-266.2.

Glen A. Huff, Timothy M. Richardson, Huff, Poole & Mahoney, P.C., Virginia Beach, VA, Sterling H. Weaver, Sr., Portsmouth, VA, Michele Jill Brace, Robert Edward Lee, Jr., Mark E. Olive, Richmond, VA, for Petitioner.

Robert H. Anderson, III, Assistant Attorney General, Richmond, VA, for Respondent.

OPINION AND FINAL ORDER

REBECCA BEACH SMITH, District Judge.

This matter was initiated on February 7, 1997, by petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner was convicted for the capital murder of Virginia State Trooper Jose Cavazos, and was sentenced to death on January 14, 1994.[1] The petition alleges violations of federal rights pertaining to petitioner's conviction and sentencing in the Circuit Court of Prince William County, Virginia. Specifically, Weeks attacks the validity of his conviction and sentence on thirty-four (34) separate grounds.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure, and Rule 29 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. The Magistrate Judge's Report and Recommendation (R & R) was filed on July 30, 1997, recommending that the petition be denied and dismissed.

By copy of the report, each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On August 18, 1997, this court received "Petitioner's Objec-

1. The Magistrate Judge's Report and Recommendation (R & R) contains a detailed statement of facts, which this court adopts.

tions to United States Magistrate Judge's Report and Recommendation," and respondent's "Objections to Magistrate Judge's Report and Recommendation." The parties' respective responses to the objections were both filed on September 5, 1997.

Petitioner objects to each of the Magistrate Judge's recommendations to deny the individual claims presented in the Petition for a Writ of Habeas Corpus. However, of the claims on which the merits were reached, Weeks relies most heavily on Claims I, V, X, XVIII, XX, XXVI, XXVII, XXVIII, and XXIX. Petitioner maintains that these claims entitle him to conduct discovery, present evidence, and ultimately receive a Writ of Habeas Corpus. Respondent does not contest the ultimate recommendation of the Magistrate Judge, but does object to some specific rulings within the R & R. Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the court, having reviewed the record in its entirety, shall make a *de novo* determination of those portions of the Magistrate Judge's R & R to which petitioner and respondent have specifically objected.[2] The court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

In addition, there is an outstanding objection to the Magistrate Judge's January 23, 1997, Opinion and Order denying Weeks' request for expert assistance. This court will also review that decision and the corresponding objection. *See infra* part III.A.

Discussion

I. Preliminary Objections

Two of respondent's objections do not go to the Magistrate Judge's analysis of any particular claim, but to underlying findings that affect the standard of review used throughout the R & R. First, respondent objects to the Magistrate Judge's finding that Virginia does not satisfy the "opt-in" requirements in Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Respondent also objects to the Magistrate Judge's determination that petitioner's defaulted allegations are potentially reviewable under the "actual innocence" doctrine.

A. "Opt-In" Requirements

[1] With respect to the first objection, this court, by order dated November 21, 1996, affirmed this very finding by the Magistrate Judge.[3] Therefore, this court will treat respondent's objection as a motion to reconsider. For the following reasons, the court upholds its earlier decision and finds that Virginia does not meet the "opt-in" requirements of the AEDPA.

The AEDPA, which became effective on April 24, 1996, makes significant changes to the law of federal habeas corpus review, including creating a new Chapter 154 of Title 28 of the United States Code. Sections 101 through 106 apply generally to all federal habeas petitions. However, § 107 of the Act, which creates Chapter 154, applies specifically to petitions filed in capital cases. In addition to providing for expedited review, Chapter 154 affects habeas petitions in death penalty cases by narrowing the issues cognizable on federal habeas and by requiring federal courts to give even greater deference to state courts, prior resolution of issues presented in these petitions. *See* § 107(a).

Section 107 specifically states that it "shall apply to cases pending on or after the date of enactment of this Act." § 107(c). However, § 107 provisions, providing greater deference to state proceedings, are applicable only if the state meets the "opt-in" requirements set forth in § 107. To qualify for habeas benefits under the "post-conviction" prong of the "opt-in" provisions, a state must establish a mechanism that provides for the appointment, compensation, and reimbursement of competent counsel for all indigent capital de-

2. The court will generally follow the organization of the Magistrate Judge's R & R, discussing only those portions to which there are objections.

3. Respondent made this same objection on November 4, 1996, in relation to the filing schedule ordered by the Magistrate Judge. The schedule was not pursuant to the "opt-in" provisions, which require expedited review for qualifying states. This court's November 21, 1996, order was a summary order holding that Virginia does not satisfy the "opt-in" requirements of the Act.

fendants in its state post-conviction proceedings.[4] In other words, § 107 creates a "quid pro quo arrangement under which States are accorded stronger finality rules on federal habeas corpus review in return for strengthening the right to counsel for indigent capital defendants." *Satcher v. Netherland*, 944 F.Supp. 1222, 1238 (E.D.Va.1996) (quoting H.R.Rep. No. 23, 104th Cong., 1st Sess. 10 (1995)), *rev'd in part on other grounds sub nom. Satcher v. Pruett*, 126 F.3d 561 (4th Cir.), *and cert. denied*, — U.S. —, 118 S.Ct. 595, 139 L.Ed.2d 431 (1997).

Specifically, in order to "opt-in" a state must meet all four of the following criteria:

1. The State must establish by statute, rule of its court of last resort, or other agency authorized by state law a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital defendants. *See* § 2261(b).

2. Such mechanism must provide standards of competency for the appointment of such counsel. *See* § 2261(b).

3. Such mechanism must affirmatively offer counsel to all state prisoners under capital sentence. *See* § 2261(c).

4. Such mechanism must provide for the entry of a court order either appointing counsel to each indigent capital defendant, or explaining that such an appointment was not made on the basis that a defendant was not indigent or rejected the offer of counsel with an understanding of the legal consequences. *See* § 2261(c).

Although not always for identical reasons, other judges in this district have recently held that the Commonwealth of Virginia does not meet the qualifications of Chapter 154 of the AEDPA. *Wright v. Angelone*, 944 F.Supp. 460 (E.D.Va.1996) *see also Breard v. Netherland*, 949 F.Supp. 1255, 1261–62 (E.D.Va.1996), *aff'd sub nom. Breard v. Pruett*, 134 F.3d 615 (4th Cir.1998); *Satcher v. Netherland*, 944 F.Supp. 1222, 1238 (E.D.Va.1996). Virginia does clearly meet the third and fourth requirements, as applied in this case. As of July 1, 1995, the appointment of counsel in the post-conviction process became automatic.[5] Counsel was appointed for Weeks on October 10, 1995, and his state habeas proceedings became final on March 15, 1996. Accordingly, the state was in compliance with the third and fourth requirements of the "opt-in" provisions, using either date as the measuring point.[6]

[2] However, Virginia has failed to meet the first "opt-in" requirement. Virginia fails to meet the requirement of a comprehensive mechanism for the appointment, compensation, and payment of reasonable litigation expenses for counsel. *See Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.1996) ("the Virginia statutes and regulations do not specifically provide for compensation or payment of litigation expenses of appointed counsel, as § 107 requires"); *see also Satcher*, 944 F.Supp. at 1241–42 (for detailed discussions of why Virginia fails to meet the compensation requirement); *Wright*, 944 F.Supp. at

4. 28 U.S.C. § 2261. Virginia could also benefit from the special provisions if they qualify under another "opt-in" prong, which provides for "unitary review" procedures under § 2265. A unitary review procedure allows a person under a sentence of death to raise on direct review of the judgment such claims as could be raised on collateral attack. 28 U.S.C. § 2265. Virginia does not have such a procedure and therefore the provision does not apply. *See also Wright v. Angelone*, 944 F.Supp. 460, 462 (E.D.Va.1996).

5. Between July 1, 1992, and June 30, 1995, the appointment of counsel was made only upon request by the petitioner. Va.Code § 19.2–163.7 (prior to 1995 amendment). The *Satcher* and *Wright* courts both held that Virginia had not satisfied the third and fourth "opt-in" requirements in time to apply in those cases. *Satcher*, 944 F.Supp. at 1243–44; *Wright*, 944 F.Supp. at 463.

6. In *Wright*, the court held that the date of appointment is the appropriate date by which to judge the sufficiency of the state system. 944 F.Supp. at 463. However, in *Satcher*, the court judged Virginia's system as of the date petitioner's habeas petition was finally denied. 944 F.Supp. at 1243 (following dictum in *Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.)), *cert. denied*, — U.S. —, 117 S.Ct. 503, 136 L.Ed.2d 395 (1996). This court need not decide which is the better measuring event, as Virginia clearly is in compliance with the third and fourth "opt-in" requirements, using either of dates that are possibly applicable to Weeks.

464–65 (same). As Judge Payne held in *Satcher*, this requirement could only be satisfied by strict, rather than substantial compliance. *Satcher*, 944 F.Supp. at 1242. There has been no change in Virginia law, since the *Satcher* and *Wright* decisions, that would require a different outcome. Thus, the Commonwealth is not entitled to the special review that may be granted some states for their capital cases under Chapter 154.[7]

The other provisions in the AEDPA clearly do apply in this case, as the petition was filed well after April 24, 1996, the enactment date of the Act.

B. Actual Innocence Doctrine

[3] The Magistrate Judge examined Weeks' petition to determine if his procedurally defaulted ineffective assistance claims were reviewable under the "fundamental miscarriage of justice," or "actual innocence," doctrine. R & R at 27–31. The Magistrate Judge ultimately held that Weeks could not meet the required burden of proof, and thus his procedurally defaulted claims were not reviewable. *Id.* Respondent argues that the Magistrate Judge erred in even applying the "actual innocence" doctrine in petitioner's case. According to respondent, both 28 U.S.C. § 2264(a) and 28 U.S.C. § 2254(e)(2) dispense with any concept of "actual innocence of the death penalty."

Prior to passage of the AEDPA in 1996, the law was clear on the reviewability of procedurally defaulted claims. Generally, this court may not review claims that have been clearly and expressly defaulted under an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A state procedural default bars federal habeas corpus review of the claim, unless petitioner can show both justifiable *cause* for, and actual *prejudice* resulting from, his default. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87–88, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). If a petitioner cannot show "cause" and "prejudice" sufficient to excuse a procedural default, his claims may still be reviewed where refusal would result in a "fundamental miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 314–15, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Under this doctrine, if a constitutional violation has probably resulted in the conviction of someone who is actually innocent, the writ may be granted. *Schlup*, 513 U.S. at 323, 115 S.Ct. 851. To show "actual innocence of the death penalty," a petitioner must show "by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under [the applicable state law]." *Sawyer v. Whitley*, 505 U.S. 333, 347, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). It is only after meeting this very difficult burden that a petitioner may actually have his defaulted claims of constitutional error reviewed.

According to respondent, the "actual innocence of the death penalty" doctrine no longer provides a gateway for petitioners to have their defaulted claims reviewed on habeas. In support of this position, respondent first points to 28 U.S.C. § 2264(a). The statute provides, in pertinent part:

> (a) ... the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is
>
> (1) the result of State action in violation of the Constitution or laws of the United States;
>
> (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or
>
> (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim....

28 U.S.C. § 2264(a).

Section 2264(a) does seem to strictly limit the circumstances under which a defaulted

7. Since Virginia fails to satisfy the first requirement it is not necessary to determine whether the state satisfies the second requirement of establishing sufficient standards of competency for appointed counsel. *See Wright*, 944 F.Supp. at 466–67 (holding that Virginia fails to meet this requirement); *but see Satcher*, 944 F.Supp. at 1242–43 (holding that Virginia does meet the requirement for providing standards of competency).

claim may be reviewed by a federal district court.[8] However, § 2264 only applies once a state has qualified under Chapter 154 as an "opt-in" state. Because Virginia is not an "opt-in" state, § 2264(a) does not apply to Weeks' petition. *See supra* part I.A.

Respondent next points to 28 U.S.C. § 2254(e)(2)(B) in support of the Commonwealth's argument that the "actual innocence of death penalty" gateway is no longer available to petitioners seeking a review of their defaulted claims. Section 2254(e) provides:

> (1) [In a habeas corpus proceeding] a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Section 2254(e)(2) does limit the circumstances under which a court may order an evidentiary hearing to develop facts underlying a claim made by a petitioner. On its face, however, the provision does not speak to the issue of when a federal court may consider a *claim* that has been procedurally defaulted. Instead, the section only governs when a defendant has failed to develop facts underlying a particular claim. In such a situation, the defendant may or may not have failed to raise the related claim. The question of whether a defendant has previously raised a constitutional claim is clearly a separate issue from whether he has previously introduced certain evidence.

The state does not, however, argue that § 2254(e)(2) directly overrules or changes the applicable standard for deciding when a defaulted claim may be reviewed. Instead, the state's argument seems to be that, as a practical matter, § 2254(e)(2)(B) necessarily dispenses with the concept of actual innocence of the death penalty, since actual innocence of the *underlying offense* is the required showing for an evidentiary hearing.

It is true that, if a petitioner can only show innocence of the death penalty, and not of the actual crime, he may not be entitled to develop facts in an evidentiary hearing.[9] Accordingly, a petitioner could, for all practical purposes, be prevented from presenting a defaulted claim, even though he technically meets the miscarriage of justice standard. However, this will only be true when a hearing is needed to develop the facts underlying the raised claim. A claim may or may not have an underlying factual basis that needs further developing. If a petitioner does not

8. It is not clear to this court whether Congress's intention in writing 2264(a) was to completely eliminate the "actual innocence" exception in capital cases, or merely to strictly limit what could be considered "cause" under the cause and prejudice exception. In the past, the Supreme Court held that the miscarriage of justice exception would still allow successive claims to be heard even though the language, from which the exception developed, was removed from the relevant statute, 28 U.S.C. § 2244(b). *Sawyer*, 505 U.S. at 339, 112 S.Ct. 2514 (reciting the history of the "actual innocence" exception). Because § 2264(a) does not apply here, this court offers no opinion on the provision's precise effect.

9. The actual effect of 2254(e)(2)(B) on capital cases is not entirely clear. *See Cardwell v. Netherland*, 971 F.Supp. 997, 1009 (E.D.Va.1997) ("It is unresolved in this circuit whether the 'innocence' requirement of § 2254(e)(2)(B) requires a petitioner facing the death penalty to demonstrate innocence of the crime of which he was convicted or merely 'innocence of the death penalty.' "). For the purpose of this discussion, this court will assume that the state is correct, and that only a showing of actual innocence of the crime will satisfy the requirements for obtaining an evidentiary hearing.

need to introduce any evidence, or further develop any facts to advance his constitutional claim, then § 2254(e)(2) would not be applicable.

For instance, the claim of actual innocence of the death penalty may rely not on new facts, but rather on an error that allowed the introduction of erroneous information. It may be possible to show that, without such facts, no reasonable fact finder would have found the petitioner eligible for the death penalty. The Supreme Court has suggested that such an error would be a possible way to meet the actual innocence of the death penalty standard. *Smith v. Murray*, 477 U.S. 527, 538, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (holding that the habeas petitioner failed to show actual innocence of the death penalty because the "alleged constitutional error neither precluded the development of true facts nor *resulted in the admission of false ones.*"); *see also Sawyer v. Whitley*, 505 U.S. 333, 340, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992) (citing same passage in explaining the standard). Another example would be if a petitioner raises a claim that the jury was erroneously instructed on the law at sentencing. It may be possible to show that, but for the error, no reasonable juror would have found the petitioner eligible for the death penalty. In such cases, the limitations of § 2254(e)(2) would not apply because the petitioner would not be attempting to introduce any new evidence, or develop new facts that he previously failed to develop.

[4] In addition, the limitations of § 2254(e)(2) would not apply where the applicant did not "fail" to introduce the relevant factual evidence in state proceedings. This court agrees with other courts that have examined this issue, and have held that § 2254(e)(2) does not apply when a petitioner attempted to, but was denied the opportunity to develop the facts by the state courts. *See Cardwell v. Netherland*, 971 F.Supp. 997, 1009–12 (E.D.Va.1997) (for a thorough discussion of this provision of the statute); *see also Love v. Morton*, 112 F.3d 131, 136 (3d Cir.1997); *Burris v. Parke*, 116 F.3d 256 (7th Cir.1997); *Washington v. Mazurkiewicz*, 1997 WL 83771, at *2 n. 1 (E.D.Pa. Feb.25, 1997).

[5–7] By prefacing the requirements with "[i]f the applicant has failed to develop the factual bases of a claim" the statute, on its face, indicates that the above interpretation is the correct one. § 2254(e)(2). The statute seems to expressly apply only where the flawed fact-finding is somehow attributable to the petitioner.[10] In addition, as the *Burris* court held, "failure implies omission—a decision not to introduce evidence when there was an opportunity, or a decision not to seek an opportunity." *Burris*, 116 F.3d at 258. Furthermore, a strict liability interpretation would allow states to insulate "its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts." *Burris*, 116 F.3d at 259. If Congress had intended to create a type of strict liability statute, it could have easily provided that the requirements of § 2254(e)(2) apply whenever the factual basis of a claim was not developed in state court proceedings. Thus, where the faulty record is attributable to the state, and not the defendant, § 2254(e)(2) will not apply.[11] In conclusion, the court holds that § 2254(e)(2)(B) does not necessarily dispense with the concept of "actual innocence of the death penalty." The standard for determining when a procedurally defaulted claim may be reviewed has not been altered by the

10. Of course, omissions by counsel are also attributable to the client. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (holding that in absence of performance that is constitutionally ineffective, petitioner bears risk for all attorney errors that result in procedural default).

11. This interpretation also accords with the President's understanding of § 2254(e) when he signed Pub.L. 104–132 into law. He stated: "If [§ 2254(e) (as amended)] were read to deny litigants a meaningful opportunity to prove the facts necessary to vindicate federal rights, it would raise serious constitutional questions. I do not read it that way. The provision applies to situations in which 'the applicant has failed to develop the factual basis' of his or her claim. Therefore, [§ 2254(e) (as amended)] is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court." Statement of the President, Office of the Press Secretary, April 24, 1996.

general provisions of the AEDPA.[12] Accordingly, the reviewability of such claims are still governed by the standards developed by the Supreme Court, in cases such as *Murray v. Carrier* and *Sawyer v. Whitley*. 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Generally, a procedurally defaulted claim will not be reviewable. The exception is if a petitioner can show either (1) cause and prejudice for his default; or (2) that failure to hear the claims would constitute a "miscarriage of justice." See *Sawyer*, 505 U.S. at 338–39, 112 S.Ct. 2514. To meet the miscarriage of justice exception, the petitioner must show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Those petitioners who are sentenced to death may also meet the exception by showing through clear and convincing evidence that but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. *Sawyer*, 505 U.S. at 336, 112 S.Ct. 2514.

Whether an evidentiary hearing may be granted for the purpose of developing facts not previously developed in state court is an entirely separate question. In some cases, a constitutional claim will not need further factual development. In other cases, § 2254(e)(2) will not be applicable because the failure to develop facts in state court will not be attributable to the petitioner. Of course, it is also possible that a petitioner who meets the standard for having a defaulted claim reviewed, and who needs to further develop facts that he failed to previously develop, may not be able to make the showing required under § 2254(e)(2). Such a petitioner will thus be unable to develop the facts necessary to properly present his claim, even though his defaulted claim is technically reviewable under the applicable *Sawyer* standard. But whether that latter situation arises will depend on the particular claims raised and the particular circumstances of a petitioner's case.

12. As explained above, the standard has been changed in death penalty cases, but only for those cases that are in states which have "opted-in" to the special provisions of Chapter 154. 28 U.S.C. § 2264(a)

For the above reasons, the court finds that the Magistrate Judge did not err in evaluating petitioner's defaulted claims under the "actual innocence of the death penalty" standard to determine if his procedurally defaulted claims warranted review on the merits. The Magistrate Judge was also correct in finding that Virginia does not qualify for special review under Chapter 154, because it has not met the "opt-in" requirements.

II. Procedural Default

A. Ineffective Assistance Claims

Weeks' petition contained a number of ineffective assistance of counsel claims. Only Claims IX and XXXI are free-standing claims. Many of Week's other thirty-two substantive claims, however, contain ineffective assistance claims argued "in the alternative." Only one ineffective assistance claim, Claim IX, was raised in Weeks' state habeas petition. The other ineffective assistance of counsel claims were never presented to the Supreme Court of Virginia. In addition, Weeks' state habeas petition was never reviewed on the merits because it was dismissed by the Supreme Court of Virginia as untimely. Thus, none of petitioner's ineffective assistance of counsel claims were ever presented to Virginia's highest state court.

The Magistrate Judge found that all of Weeks' ineffective assistance of counsel claims were procedurally defaulted, due to both the untimely filing of his state habeas petition, and the omission of claims from the petition. In addition, the Magistrate Judge found that none of the defaults were excused by either the "cause and prejudice" or the "actual innocence" exceptions. Petitioner objected to each of these findings.

1. Untimely State Habeas Petition

[8] Weeks objects to the Magistrate Judge's conclusion that the dismissal of the state habeas petition for untimeliness was an adequate and independent state bar to federal review. Effective on July 1, 1995, prisoners under sentence of death were required to

comply with a statute of limitations for filing a habeas petition, and they were limited to filing an original petition in the Virginia Supreme Court. Va.Code §§ 8.01–654.1, 8.01–654(C)(1); Supreme Court Rule 5:7A. Weeks' counsel originally filed a petition for habeas corpus in the wrong court; he filed in the Circuit Court of Prince William County instead of the Supreme Court of Virginia. On December 1, 1995, the date on which the petition was due under the new statute of limitations, counsel withdrew the petition from the circuit court and mailed it, by regular mail, to the Supreme Court of Virginia. On March 15, 1996, the Supreme Court dismissed the petition as jurisdictionally barred because it was not timely.[13]

[9] Petitioner points out that a state procedural rule is not adequate to preclude federal court review of the merits unless that rule is both firmly established and regularly applied. *See Ford v. Georgia*, 498 U.S. 411, 424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991). Weeks argues that the rule applied to him in this case was not firmly established. According to petitioner, the rule of "dismissing untimely original habeas petitions" was not firmly established because the court had never before had an "opportunity to consider how it would treat an untimely habeas petition under its original jurisdiction." Petitioner's Objections at 9. Because there was no precedent dismissing original habeas petitions for untimeliness, petitioner maintains that the rule cannot be considered firmly established.

[10] This objection is without merit. As a general matter, procedural rules derived from unambiguous state statutes and supreme court rules are necessarily "firmly established." *O'Dell v. Netherland*, 95 F.3d 1214, 1241 (4th Cir.1996), *aff'd on other grounds*, — U.S. —, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997).[14] The applicable statute provides that "[n]o petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after ... denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal...." Va.Code § 8.01–654.1. This statute, which was relied on by the Supreme Court in dismissing Weeks' habeas petition, is clear and unambiguous. Accordingly, the Magistrate Judge correctly found that the Virginia Supreme Court's dismissal of Weeks' petition as untimely was a state ground "adequate" to bar federal habeas review. Thus, all of petitioner's claims of ineffective assistance are defaulted, including Claims IX and XXXI.

2. Cause and Prejudice

[11] Weeks objects to the Magistrate Judge's conclusion that the performance of his state habeas counsel does not excuse the procedural default of his claims. Petitioner argues that he has a constitutional right to effective state post-conviction counsel for the purpose of presenting claims that, as a matter of law, could not have been raised on direct appeal. In Virginia, claims of ineffective assistance of trial counsel may only be presented on collateral review, and not on direct appeal. *Goins v. Commonwealth*, 251 Va. 442, 470 S.E.2d 114, 124 n. 2(Va.), *cert. denied*, — U.S. —, 117 S.Ct. 222, 136 L.Ed.2d 154 (1996). According to petitioner, it follows that ineffective assistance of state habeas counsel does constitute cause for failure to raise ineffective assistance of trial counsel claims.

[12] Ineffective assistance of counsel may constitute "cause" for procedural default, under certain circumstances. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Attorney error will only constitute "cause" if, at the time of the error,

13. The Supreme Court of Virginia does not accept pleadings mailed but not received within the prescribed time limits unless they are sent by certified or registered mail. Supreme Court Rule 5:5(b).

14. In the case cited by petitioner, *Ford v. Georgia*, the new procedural rule was held to be not firmly established only because it was created *after* the time that petitioner would have had to obey the rule. 498 U.S. at 424–25, 111 S.Ct. 850. In this case, the rule is not being applied retroactively. The new rule for filing habeas petitions in death penalty cases was clearly in effect before Weeks was required to file his petition.

petitioner had a constitutional right to the assistance of counsel. *See Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The United States Supreme Court has established that, although there is a right to counsel on a first appeal as of right, there is no constitutional right to counsel on post-conviction collateral review. *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). However, the Supreme Court arguably, in *Coleman*, left open the possibility that there may be an exception to the rule of *Giarratano* and *Finley*, at least where state collateral review is the first place in which a prisoner can raise a particular claim. *Coleman*, 501 U.S. at 755, 111 S.Ct. 2546. The Supreme Court specifically declined to decide the question at that time. *Id.* If there is such a *Coleman* exception, a showing of ineffective assistance of counsel in state habeas could constitute cause for failure to raise Weeks' ineffective assistance of trial counsel claims.

However, the Fourth Circuit Court of Appeals has recently examined this very question, rejecting the argument advanced by Weeks. *Mackall v. Angelone*, 131 F.3d 442 (4th Cir.1997) (*en banc*), *cert. denied*, — U.S. —, 118 S.Ct. 907, 139 L.Ed.2d 922 (1998). The court explained that it was bound by the Supreme Court's controlling holding in *Finley* until it was actually overruled by the Supreme Court, and not merely questioned by the Court. *Id.* at 449. Accordingly, the Fourth Circuit held that Mackall did not have a constitutional right to counsel in his state habeas proceeding, even if that proceeding was his first opportunity to raise particular claims. *Id.* Thus, Mackall could not show cause to excuse the procedural default of his claims that his trial and appellate counsel were ineffective. *Id.*

Weeks makes the additional claim that, even if he had no Sixth Amendment right to counsel on state habeas, he had a due process right based on his state statutory right to counsel. However, for the reasons stated in the Report and Recommendation, Weeks has not shown that the due process clause was violated. Nor has he shown that such violation, if proven, would be equivalent to a violation of the Sixth Amendment Right to Counsel, such that it could constitute cause under *Coleman*, 501 U.S. at 752, 111 S.Ct. 2546 (holding that an error by counsel could constitute cause for defaulting a claim, but only if at the time of the error, petitioner had a constitutional right to the assistance of counsel).

Pursuant to *Mackall*, Weeks had no constitutional right to counsel on state collateral review, even though he had no opportunity to present his ineffective assistance of counsel claims at an earlier point. Consequently, Weeks cannot demonstrate cause to excuse the procedural default of his ineffective assistance of counsel claims.

3. Fundamental Miscarriage of Justice

[13] Petitioner objects to the Magistrate Judge's conclusion that Weeks did not meet the standard to have his defaulted ineffective assistance claims reviewed under the "miscarriage of justice" exception. For the following reasons, the Magistrate Judge did not err in finding that Weeks' defaulted ineffective assistance claims could not be reviewed.

Weeks does not claim that he is actually innocent of the murder of Trooper Cavazos, but only that he is "actually innocent" of the death penalty. In order to have any of his defaulted claims reviewed on the merits, Weeks is required to show by clear and convincing evidence that but for constitutional error, no reasonable juror would have found petitioner eligible for the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). In addition, a petitioner must focus "on those elements which render a defendant eligible for the death penalty, and not on additional mitigating evidence which was prevented from being introduced as a result of a claimed constitutional error." *Id.* at 347, 112 S.Ct. 2514. Accordingly, Weeks must show that he was actually ineligible for the death penalty under Virginia law, so that barring the constitutional error, no reasonable juror would have sentenced him to death.

Under Virginia law, a juror must find one of two aggravating factors for a defendant to be eligible for the death penalty: (1) that

there is a reasonable possibility that the defendant would commit criminal acts of violence which would constitute a continuing serious threat to society ("future dangerousness"); or (2) the defendant's conduct in committing the offenses was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim ("vileness"). Va. Code § 19.2-264.4(c). In Weeks' case, the Commonwealth presented evidence on the second factor, "vileness." The state focused on proving depravity of the mind and/or aggravated battery. *See* R & R at 29–30 (for description of evidence presented to support presence of both factors). The jury found the presence of "vileness," and subsequently imposed the penalty of death. The Virginia Supreme Court specifically found that both depravity of mind and aggravated battery were sufficiently established. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379 (1994), *cert. denied sub nom. Weeks v. Virginia*, 516 U.S. 829, 116 S.Ct. 100, 133 L.Ed.2d 55 (1995).

In order to have his ineffective assistance of counsel claims reviewed on the merits, Weeks must show that but for the ineffective assistance, no juror would have found the presence of the "vileness" aggravating factor. The Magistrate Judge was correct in noting that Weeks' "petition glosses over his claims of ineffective assistance for the most part, raising the claims in the alternative to substantive claims, addressing them in a cursory fashion." R & R at 30.[15] He never explains how the alleged ineffective assistance of counsel affected the finding of the presence of vileness, an aggravating factor. He certainly does not show by clear and convincing evidence that but for ineffective assistance of counsel, no jury would have found petitioner eligible for death.

In his petition, where he does argue ineffective assistance of counsel, petitioner merely argues that a "reasonable probability exists that, absent counsel's deficient performance occasioned by the trial court's error, the outcome at trial would have been different with respect to guilt and/or sentence." This is a restatement of the prejudice prong of the *Strickland* test. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, even if petitioner could meet the *Strickland* prejudice prong, that is not sufficient to meet the higher burden required to show actual innocence of the death penalty.[16]

Weeks, in his objections to the R & R, argues that the Magistrate Judge erred because "it is 'clear and convincing' that no reasonable juror would have sentenced Mr. Weeks if it were not for the denial of defense expert assistance and the ineffectiveness of trial counsel forced to proceed without such assistance." Petitioner's Obj. to R & R at 15–16. There are a number of separate assumptions comprising petitioner's argument.

According to petitioner, the state's entire aggravation case was built on the testimony of forensic and ballistic experts. "Thwarted by the court's repeated refusal not only to provide forensic and ballistic expert assistance, but also to permit the trial defense counsel to request such assistance in an *ex parte* hearing, Mr. Weeks' trial defense counsel was ineffective because he was barred from obtaining and using essential members of the trial team." Petitioner's Obj. to R &

15. Only Claims IX and XXXI were raised independently, and neither have any relationship to the finding that Weeks was eligible for the death penalty based on vileness. Claim IX alleges that Weeks' trial counsel was ineffective in advising him to plead guilty to grand larceny and use of a firearm. Claim XXXI simply alleges general ineffective assistance of trial counsel.

16. Of course, at the points where these claims of prejudice were raised, petitioner was assuming that the claims were in fact reviewable on the merits. Because petitioner, at that point, was arguing the merits of the ineffective assistance of counsel claims, he was only trying to show *Strickland* prejudice and not "actual innocence." Earlier in the petition, Weeks argued that his procedural default should be excused for cause due to the ineffectiveness of state habeas counsel. *See* Pet. at 36. Petitioner never actually argued in his petition that, in the alternative, the default should be excused under the "actual innocence" exception. However, the Magistrate Judge *sua sponte* chose to review the claims for such an exception, and the petitioner subsequently filed objections to the Magistrate Judge's conclusions. Accordingly, this court will review that portion of the R & R, as well as the corresponding objections, as if it had been raised in the petition.

R at 14–15. According to Weeks, this ineffective assistance of counsel affected the finding of the "vileness" aggravating factor because petitioner did not have the ability to challenge the Commonwealth's experts or present evidence in support of the defense theory of the case.

The court will assume for the sake of this discussion, as petitioner seems to, that the only evidence offered to show vileness came from the ballistic and forensic experts.[17] The court will also assume that, if Weeks had been granted his motion for the appointment of expert assistance, no jury would have found him eligible for the death penalty. Assuming all of that to be true, Weeks would still not have made the showing that is required to have his ineffective assistance of counsel claims reviewed.

[14–16] The "actual innocence" doctrine is a gateway through which a petitioner may have specific defaulted constitutional claims reviewed. To have a defaulted constitutional claim reviewed, petitioners are required to link their new evidence to that defaulted claim, with a showing that it is the claimed error which prevented the fact finder from adequately considering the evidence at trial. *Spencer v. Murray*, 18 F.3d 229, 236 (4th Cir.1994).[18] This is because the actual innocence exception "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). The habeas court does not sit to correct errors of fact, but to ensure that individuals are not imprisoned in violation of the constitution. *Id.* at 400–01, 113 S.Ct. 853.

The problem, in this case, is that the constitutional error, which petitioner is claiming should be reviewed, is not the alleged trial court error denying the motion for expert assistance. Instead, Weeks is arguing that his ineffective assistance of counsel claims should be reviewed. However, he never sufficiently explains precisely how his trial counsel was ineffective and how that ineffectiveness contributed to the finding of "vileness."

Petitioner essentially argues that, as result of the court's denial of expert assistance, his counsel's representation was rendered ineffective. *See* Petitioner's Obj. to R & R at 14; Pet. for Writ at 42. However, he does not actually point to an error by defense counsel that may have affected the jury's decision on vileness. Weeks does not point to anything done by counsel, which should not have been done, or anything counsel failed to do, which he should have done. An example of such error would be if counsel had failed to request the appointment of such assistance. In

17. Petitioner ignores the fact that most of the evidence relied on to show vileness and depravity of the mind did not come from the ballistics and forensic experts, and in fact consisted of many details of the crime that were admitted to by Weeks himself. Some of these facts are included in the following paragraph taken from the Supreme Court of Virginia's decision. "On probation, riding in a stolen vehicle, and possessing a weapon that the evidence showed had been used in a previous North Carolina murder, defendant shot the trooper at virtually point-blank range at least six times to avoid arrest.... The officer posed no threat to defendant in connection with this routine traffic stop; the trooper died with his service revolver still enclosed in its holster. Then, the defendant left and returned to the scene, falsely claiming that the attempted to render assistance to the victim when his real purpose was to retrieve incriminating evidence." *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 390–391 (1994).

18. The Fourth Circuit Court of Appeal has since questioned the correctness of *Spencer*, in light of the Supreme Court's decision in *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). *See O'Dell v. Netherland*, 95 F.3d 1214, 1246 n. 26 (4th Cir.1996) (The court pointed out that *Spencer* rested on *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), which was rejected by *Schlup* for claims of actual innocence of the crime itself, and that *Schlup* makes no mention of a "but for" requirement). However, the court has not yet overturned *Spencer*. *See O'Dell*, 95 F.3d at 1246 n. 26. Moreover, to the extent that the Supreme Court's decision in *Schlup* would affect the *Spencer* holding, it would only affect it with respect to claims of actual innocence of the crime itself. *Sawyer*, the case upon which *Spencer* relied, still governs the standard of review for claims involving actual innocence of the death penalty. *See Sawyer*, 505 U.S. at 333, 112 S.Ct. 2514 (petitioner must show "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law").

point of fact, Weeks' counsel did move for the appointment of expert assistance in a timely manner. In addition, there is no evidence that counsel could have done anything differently to persuade the court to change its mind and appoint such assistance.[19]

The court finds that petitioner has made no colorable showing of an underlying constitutional error by counsel that is related to the jury finding of eligibility for the death penalty. Thus, petitioner has clearly not met the standard required to show that a miscarriage of justice will result if his defaulted ineffective assistance of claims are not reviewed.

B. Claims Barred Under Supreme Court Rule 5:25

[17] Petitioner objects to the Magistrate Judge's finding that Weeks' Claims IV and XXIV are procedurally barred, and thus should be dismissed. The Supreme Court of Virginia had dismissed the claims on direct appeal under Supreme Court Rule 5:25. Rule 5:25 prohibits the consideration of errors which were not contemporaneously objected to at trial, and thus preserved for appeal.

The Magistrate Judge held that Rule 5:25 constitutes an adequate and independent state bar, such that a federal court may not review these claims unless the petitioner can demonstrate "cause" and "prejudice" for his default. The Judge further found that petitioner could not demonstrate cause to excuse his default. Petitioner objects to the finding that Rule 5:25 constitutes an adequate and independent state bar. Specifically, Weeks argues that the Rule is not firmly established and regularly followed, as required to be an adequate and independent procedural bar to federal review. *See Ford v. Georgia*, 498 U.S. 411, 423, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991); *James v. Kentucky*, 466 U.S. 341, 348–51, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984).

Although the adequate and independent determination is a federal question, the conclusion that a state does not require a contemporaneous objection is a significant determination, and "should not be reached lightly or without clear support in state law." *Meadows v. Holland*, 831 F.2d 493, 497 (4th Cir.1987) (*en banc*), *vacated on other grounds*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 575 (1989). According to the Fourth Circuit Court of Appeals, the effect would be to "substantially diminish the concept of finality in the operation of the state criminal justice system." *Id.*

This court's own careful *de novo* review of the decisions involving Virginia's contemporaneous objection rule convinces this court that this procedural bar satisfies the requirement of consistent application. Consequently, the rule constitutes an "adequate and independent state ground" upon which federal review may be precluded. Accordingly, the court does hereby adopt and approve the findings and recommendation of the United States Magistrate Judge related to Rule 5:25. *See* R & R at 31–33 (for a detailed discussion of Rule 5:25 as a procedural bar to federal review).

C. Claims Barred Due to Failure to Brief on Direct Appeal

[18] The Magistrate Judge held that Weeks' Claims II, III, VI, VIII, XVII, XXI, and XXIII are procedurally defaulted and should be dismissed. Petitioner objected to this recommendation, arguing that the claims were not defaulted,[20] or in the alternative,

19. Weeks does make the additional conclusory allegation that "Mr. Weeks' trial counsel rendered ineffective assistance in the defense of Mr. Weeks by failing to argue additional reasons in support of his position which would have caused the trial court to reverse itself." Pet. for Writ at 42–43, ¶ 149. This bare assertion is clearly insufficient to show that trial counsel was ineffective.

20. Weeks disagrees with the Magistrate Judge's characterization of the procedural posture of these claims. Weeks argues that the claims were exhausted because they were presented to the Supreme Court along with supporting arguments in the original 90 page brief. He alternatively argues that the claims are exhausted because the 50 page limit constitutes "circumstances ... that render [the state's] process ineffective to protect the rights of the applicant," such that they are exhausted under 28 U.S.C. § 2254(b)(1)(B)(ii). Weeks also cites the same provision in support of the argument that he was excused from presenting the claims and arguments to the state court.

that the default is excused because the state court deprived him of the ability to present the claims.

Weeks initially filed a ninety page brief assigning forty-seven errors in his appeal. In addition, Weeks filed a motion for leave to file an oversized brief because of the Rule limiting the page length of briefs to fifty pages. Supreme Court Rule 5:26. The Supreme Court denied Weeks' motion, and ordered him to file a second, conforming, fifty-page brief. In so doing, petitioner claims he was forced to eliminate all argument in support of a number of claims. Consequently, the Supreme Court of Virginia dismissed ten alleged errors, including the current Claims II, III, VI, VIII, XVII, XXI, and XXIII, for failure to brief.

The Supreme Court clearly expressed that it was dismissing these claims for failure to brief or argue the errors, a state procedural ground. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 383 (1994) (citing *Jenkins v. Commonwealth*, 244 Va. 445, 423 S.E.2d 360, 364 (1992)). Failure to brief is an adequate and independent state ground for dismissing claims. As asserted by the Magistrate Judge, "[i]t would be completely unreasonable to expect a court to decide 'on the merits' a claim that was not briefed or argued. Thus, the only option for the [Virginia Supreme] Court in this case, faced with petitioner's unsupported and conclusory claims, was to dismiss those claims on procedural grounds." R & R at 38. Furthermore, petitioner offers no argument that the rule is not regularly or consistently applied, such that it may not be considered an adequate state ground.

In petitioner's supplemental authority for his objections, filed on November 13, 1997, Weeks points to an Eighth Circuit case to support an argument that the claims were not defaulted. However, *Clemmons v. Delo*, 124 F.3d 944 (8th Cir.1997), is clearly distinguishable from this case. In *Clemmons*, the Missouri Supreme Court had refused to consider a particular claim on the merits. There the claim had been included in a *pro se* supplemental brief, which the state court had refused to consider. The Eighth Circuit held that the claim had been fairly presented to the state court; in other words, that there was no procedural default. *Id.* at 948–49. This decision was based on the court's finding that there was no regularly applied state procedural rule, such that it was an adequate ground supporting a procedural bar. *Id.* at 948 n. 3. According to the court, the Missouri Supreme Court sometimes allows *pro se* briefs, and sometimes does not, with no regularly applied criteria. *Id.* As explained above, the Virginia Supreme Court's rule of refusing to consider claims that have not been briefed is regularly applied. As such, it is an adequate and independent state ground barring review.

[19] Petitioner argues, however, that the claims dismissed by the Supreme Court were not adequately briefed because of the imposition of the fifty-page limit. According to petitioner, this page limitation constitutes cause sufficient to excuse his procedural default. The existence of cause for procedural default must ordinarily turn on whether petitioner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). In this case, though, the actual cause of counsel's failure to properly brief particular claims was not the fifty-page limit, but was the strategic choice made by counsel to focus on particular claims.

However, it does appear that in this case the page limitation actually precipitated defense counsel's decision to make this strate-

See Petitioner's Obj. to R & R at 18. However, § 2254(b)(1) has no bearing on whether a procedural default may be excused, such that it can be reviewed on the merits. Section 2254(b)(1) bears only on the exhaustion doctrine. Furthermore, petitioner is conflating the issues of exhaustion and default. As explained by the Magistrate Judge, all of petitioner's claims are clearly exhausted at this point, regardless of the reasoning. R & R at 35–36. Both parties, as well as this court, are in agreement that petitioner's claims have been exhausted. The only issue here is whether these particular claims are procedurally defaulted by Weeks' failure to brief, and whether the default is excused such that this court may review the claims on the merits.

gic choice.[21] However, this page limitation is not unreasonable.[22] Nor is the resulting consequence that appellate counsel must make choices as to which claims to press problematic. As the Supreme Court has noted,

> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little as 15 minutes—and when page limits on briefs are widely imposed.... A brief that raises every colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, 'go for the jugular,'—in a verbal mound made up of strong and weak contentions.

Jones v. Barnes, 463 U.S. 745, 752–53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). In addition, it would make no sense if a rule, which is itself a reasonable and consistently applied state procedural rule, could constitute cause for failing to comply with another rule. All procedural rules, whether working alone or in conjunction with others, impose restrictions on litigants. It is entirely reasonable for a state to expect a litigant to comply with all of its procedural rules, as long as all of the rules are themselves reasonable and are not arbitrarily imposed.

For the above reasons and the reasons stated in the R & R, this court does hereby adopt and approve the United States Magistrate Judge's findings and recommendation that Claims II, III, VI, VIII, XVII, XXI, and XXIII are procedurally defaulted and should be dismissed. *See* R & R at 33–34.

D. Claim Barred Due to Improper Briefing on Direct Appeal

[20] The Magistrate Judge held that Weeks' Claim XXXIII is procedurally defaulted and should be dismissed. Petitioner objected to this recommendation, arguing that the procedural bar was not adequate or in the alternative, that the default is excused because the state court deprived him of the ability to present the claims.

The Supreme Court of Virginia refused to consider Claim XXXIII on direct appeal because Weeks had impermissibly incorporated by reference a memorandum filed on the subject in the trial court. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (1994) (citing *Jenkins v. Commonwealth*, 244 Va. 445, 423 S.E.2d 360, 370 (1992), for the proposition that the defendant has an obligation to state clearly to an appellate court the grounds for asserting that the trial court's ruling is erroneous, and that cross-reference to arguments presented at trial is insufficient). The *Jenkins* rule is an adequate and independent ground for dismissing claims. It is a reasonable procedural rule and there is no indication that it is arbitrarily or inconsistently applied. As such, unless Weeks can demonstrate cause and prejudice for the procedural default, the claim may not be reviewed on the merits by this court.

[21] The only cause expressed by petitioner is the briefing limitation of fifty pages. As discussed above, this limitation does not constitute cause for Weeks' procedural defaults on appeal. *See supra* part II.C. Accordingly, the court does hereby adopt and approve the United States Magistrate Judge's findings and recommendation that Claim XXXIII is procedurally defaulted and should be dismissed. *See* R & R at 39–40.

E. Claims Barred Due to Failure to Raise on Direct Appeal

[22] Petitioner objects to the Magistrate Judge's finding that Weeks failed to raise Claims XXX and XXXII in the state courts, such that these claims are now procedurally barred from review. After a *de novo* review of the record, the court agrees with the Magistrate Judge that Claims XXX and XXXII were never raised in state court. These claims would clearly be procedurally barred if Weeks attempted to bring them before a state court at this time.[23] Furthermore, the alleged ineffective assistance of state habeas counsel does not excuse petitioner's default of either claim, for the reasons stated previously. *See supra* part II.A.2.

Accordingly, the court does hereby adopt and approve the United States Magistrate Judge's findings and recommendations that Claims XXX and XXXII are procedurally defaulted and thus may not be reviewed on their merits. *See* R & R at 40–42.

F. Conclusion

For the above reasons, the following Claims are considered procedurally defaulted, and will not be reviewed by this court on their merits: II, III, IV, VI, VIII, IX, XVII, XXI, XXIII, XXIV, XXX, XXXI, XXXII, XXXIII. In addition, all of Weeks' ineffective assistance of counsel claims are procedurally defaulted and will not be reviewed.

III. Standard of Review

A. Motion for Summary Judgment

[23] Petitioner objects to the Magistrate Judge's statement of the standard governing a motion for summary judgment on the ground that it is incomplete. First, petitioner points out that the Magistrate Judge failed to mention that respondent has an initial burden in a motion for summary judgment. Accordingly, this court notes that the party seeking a summary judgment does bear the initial responsibility of informing the district court of the basis for its motion, and of identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). It is at that point that the opposing party must come forward and make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322, 106 S.Ct. 2548. This is the legal standard being applied herein by this court.

Second, petitioner points out that a summary judgment is inappropriate where a party has been denied discovery or other opportunity to develop material facts. Petitioner maintains that he has been denied an opportunity to develop material facts, by the Magistrate Judge's denial of expert assistance. According to Weeks, the assistance of a ballistics expert and forensic pathologist is necessary for him to support Claim I of his petition, in which he argues that the trial court's refusal to provide expert assistance violated his rights under the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

On December 24, 1996, petitioner filed his motion and brief in support of the motion for authorization to obtain expert assistance. The Magistrate Judge denied the request on January 23, 1997. On February 5, 1997, petitioner filed objections to the Magistrate Judge's Opinion and Order. However, Weeks' petition for a writ of habeas corpus was filed on February 7, 1997, and his objection to the Magistrate Judge's decision on the request for experts was never ruled on by this court. Consequently, this court will now review the Magistrate Judge's Opinion and Order, along with petitioner's objection.

[24] Pursuant to 28 U.S.C. § 636(b)(1)(A), the district court may "designate a magistrate to hear and determine any pretrial matter pending before the court." Following the magistrate's ruling, a "judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law." *Id.*; *see also* Fed.R.Civ.P. 72(a). The decision of whether to appoint experts is a pretrial mat-

21. Other factors could also precipitate such a strategic choice by counsel, such as the belief that the defendant has a better chance of winning on appeal by pressing only the strongest claims, rather than obscuring the strong ones with many weak claims. Of course, this factor is more relevant to the claims Weeks defaulted because of a complete failure to raise them. *See infra* part II.E.

22. The Federal Courts of Appeals and the United States Supreme Court both limit opening briefs to 50 pages. Fed.R.App.P. 28; U.S. S.Ct. R. 33.1.

23. The claims would be barred by both: (1) Virginia's abuse of the writ statute, Va.Code § 8.01–654(B)(2), prohibiting the filing of a second habeas petition on grounds known at the time of filing the first petition, and (2) Va.Code § 8.01–654.1, which states that in death penalty cases habeas petitions will not be reviewed by the Supreme Court unless it is filed within 60 days of the completion of all direct appeal remedies.

ter, and thus will be reviewed under the clearly erroneous standard.[24]

Petitioner contends that the Magistrate Judge applied the incorrect standard in deciding his request for expert assistance pursuant to 21 U.S.C. § 848(q)(9). He further maintains that the denial of the ballistics expert and forensic expert was clearly erroneous under the correct standard. This court finds that the Magistrate Judge did utilize an incorrect standard in determining the request. However, this court upholds the ultimate decision denying expert assistance, albeit for different reasons.

[25, 26] Petitioner's motion is for the appointment of a forensic pathologist and ballistics expert to assist him in the preparation of his petition for a writ of habeas corpus. Specifically, he seeks the assistance of experts to prepare his claim that his defense was prejudiced by the trial court's refusal to appoint such experts. He maintains that such experts were necessary for him to adequately present a defense on the issues of premeditation and vileness. The motion for experts was pursuant to 21 U.S.C. § 848(q)(9), which states:

> Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant, and if so authorized, shall order the payment of fees and expenses therefor under paragraph (10).

21 U.S.C. § 848(q)(9). Thus the question essentially reduces to whether the appointment of ballistic and forensic experts were reasonably necessary to Weeks in presenting his petition for § 2254 relief. The statute does not define reasonably necessary. However, courts have held that expert assistance is not reasonably necessary where an evidentiary hearing at which the testimony could be presented will not be held. *See Lawson v. Dixon*, 3 F.3d 743, 753 (4th Cir.1993); *see also Fuller v. Johnson*, 114 F.3d 491, 502 (5th Cir.) (experts not reasonably necessary where such testimony would be procedurally barred), *cert. denied*, — U.S. —, 118 S.Ct. 399, 139 L.Ed.2d 312 (1997); *Cardwell v. Netherland*, 971 F.Supp. 997, 1007 (E.D.Va. 1997) (experts not reasonably necessary if evaluations cannot be introduced); *Burris v. Parke*, 948 F.Supp. 1310, 1327 (N.D.Ind.1996) (experts not reasonably necessary where evidence cannot be introduced because petitioner is not entitled to an evidentiary hearing), *aff'd*, 116 F.3d 256 (7th Cir.1997). Accordingly, if petitioner's claim, for which he requests the expert assistance, cannot be reviewed on the merits, or if he would not be able to win on the merits regardless of the expert's finding, the appointments are not necessary for the petition.

The Magistrate Judge concluded that experts were not reasonably necessary because even if the requested experts fulfilled Week's expectations, he could not show prejudice. However, in determining that petitioner could not show that the trial court's denial of experts prejudiced him, the Magistrate Judge erroneously relied upon the Supreme Court's decision in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In *Jackson*, the Supreme Court held that the habeas court, viewing the evidence in the light most favorable to the prosecution, must ascertain whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 318–19, 99 S.Ct. 2781. The Magistrate Judge, in applying that standard to this case, held that "[i]f a rational juror could still reasonably decide to impose the death sentence in the face of this new evidence, then the experts would make no practical difference to Weeks' habeas petition and hence cannot be reasonably necessary." Opinion and Order at 9 (January 23, 1997).

The Magistrate Judge proceeded to examine the evidence introduced at trial in light of the "vileness" prong of the Virginia death penalty statute. He then held that if Weeks' experts had testified at trial as Weeks hoped they would, "that additional evidence would not entitle Weeks to a ruling that no rational juror could find 'depravity of mind and/or aggravated battery.'" Opinion and Order at 16 (January 23, 1997). Consequently, the court found that the requested forensic pathologist and ballistics expert were not "reasonably necessary" under § 848(q)(9).

24. This is in contrast to the *de novo* review accorded the Magistrate Judge's recommendations on dispositive matters, to which objections have been made. *See* Fed.R.Civ.P. 72(b).

However, *Jackson* announced the standard of review for a federal habeas court determining, on the merits, whether sufficient evidence exists to support a state court conviction. *Jackson*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. The *Jackson* standard would be relevant if Weeks wanted the experts to help prove a claim that there was insufficient evidence to support a conviction. His claim, for which he seeks assistance, though, is not that there was insufficient evidence to convict him, or even that there was insufficient evidence to sentence him to the death penalty. His underlying claim is that the trial judge violated his due process rights when he denied him expert assistance at trial.

[27] Petitioner can prevail on such a habeas claim if he can show that the state's decision was contrary to clearly established federal law, pursuant to § 2254(d), and that the error was not harmless. In showing that the trial error was not harmless, i.e., that he was prejudiced, the *Jackson* standard is not the relevant standard. The Supreme court has directed federal courts on collateral review to apply the standard set forth in *Kotteakos* to trial errors. *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Thus federal courts must determine whether the trial error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). The Fourth Circuit Court of Appeals has held that the *Brecht* harmless-error standard applies to a trial court's refusal to grant expert psychiatric assistance. *Tuggle v. Netherland*, 79 F.3d 1386 (4th Cir.), *cert. denied*, — U.S. —, 117 S.Ct. 237, 136 L.Ed.2d 166 (1996).

Accordingly, the Magistrate Judge, in deciding whether the trial court's decision prejudiced Week's, should have asked whether the denial of experts had a substantial and injurious effect or influence on the jury's sentencing decision. If it is clear that the denial did not have such a prejudicial affect, regardless of what the experts could offer and regardless of whether the denial was an error, Weeks would not be able to prevail on the merits of his claim. And consequently, the expert assistance would not be "reasonably necessary."

[28] Although the Magistrate Judge incorrectly analyzed the request for expert assistance, Weeks nevertheless is not entitled to the requested assistance. Furthermore, this court need not determine whether the trial court's decision was harmless, under even the *Brecht* standard. This court cannot grant Weeks' petition for a writ of habeas corpus, based on the state's denial of expert assistance, because it is clear that the state's decision was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Because petitioner cannot prevail on this claim, the requested expert assistance is not "reasonably necessary" for this proceeding.

The Fourth Circuit has recognized that an indigent defendant has a right to the assistance of an expert, if "a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance." *Williams v. Martin*, 618 F.2d 1021, 1026 (4th Cir.1980) (quoting *Jacobs v. United States*, 350 F.2d 571, 573 (4th Cir.1965)). However, the United States Supreme Court has not directly held that there is a federal constitutional right to non-psychiatric experts. In *Ake*, the Supreme Court case relied on by petitioner, the Court held that the state must provide an indigent defendant with a competent psychiatrist, provided the "defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Although there was some broad language in *Ake*, which could potentially be applied to a variety of circum-

stances,[25] the precise holding was limited to the facts of that case. That case only involved a request for psychiatric expert assistance. *Id.*

The Fourth Circuit recently refused to examine a habeas claim, which was similar to Week's request for experts, under the "new rule" doctrine.[26] *Gray v. Thompson*, 58 F.3d 59 (4th Cir.1995), *vacated on other grounds*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996). In that case, the petitioner maintained that the state court's refusal to appoint a private investigator for the defense contravened due process. *Id.* at 66. The Fourth Circuit stated that the "Supreme Court has flatly declined to address the question whether, 'as a matter of federal constitutional law[,] what if any showing would [entitle] a defendant to [private] assistance.'" *Gray*, 58 F.3d at 66 (citing *Caldwell v. Mississippi*, 472 U.S. 320, 323–324 n. 1, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)). The court went on to hold that by resolving that question, the court would clearly be breaking new constitutional ground. *Id.* at 66; *see also George v. Angelone*, 901 F.Supp. 1070, 1085 (E.D.Va.1995) (relying on *Gray* in refusing to decide the merits of habeas petitioner's claim that the trial court's failure to appoint an investigator deprived him of due process), *aff'd on other grounds*, 100 F.3d 353 (4th Cir.1996).

There is no reason to believe that the Fourth Circuit would treat a claim based on denials of ballistic and forensic experts differently than a claim based on the denial of an investigator. The Supreme Court, in *Ake*, did not refer to any non-psychiatric experts. More importantly, in *Caldwell*, the petitioner had requested the appointment of a criminal investigator, a fingerprint expert, and a ballistic expert. In that case, the Supreme Court was referring collectively to all three types of experts when it held that "there was no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought." *Caldwell*, 472 U.S. at 323–24 n. 1, 105 S.Ct. 2633. At least one other circuit has held that an extension of *Ake* to other kinds of experts would create a new rule under the Supreme Court's prior holdings. *See, e.g., Jackson v. Ylst*, 921 F.2d 882, 885–86 (9th Cir.1990) (the court declined to review the merits of the claim that a denial of an expert on eyewitness identification violated due process, because it would impose a new obligation on the states in violation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)).

Under § 2254(d), a petition for habeas can only be granted if the state's decision was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. *See infra* part III.B. Pursuant to the Fourth Circuit's decision in *Gray*, resolving Week's claim in his favor would require the court to announce a "new rule" of constitutional law in violation of *Teague*. Certainly, if such a decision is not permissible under *Teague*, it would also not be permissible under the AEDPA's more restrictive standard of review.[27] If finding for

25. "We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake*, 470 U.S. at 76, 105 S.Ct. 1087.

26. Under the "new rule" doctrine, before a claim of a federal constitutional violation can be reviewed, the district court must first determine whether the relief sought would create a new rule under [the Supreme Court's] holdings. *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). "If so, [the court can] neither announce nor apply the new rule ... unless it would fall into one of two narrow exceptions." *Id.* at 486, 110 S.Ct. 1257. A "new rule" is "a rule that 'breaks new ground,' 'imposes a new obligation on the States or Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.'" *Id.* at 488, 110 S.Ct. 1257 (quoting *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)).

27. Petitioner asserts that the Supreme Court of Virginia never decided this claim on the merits, and that this court should therefore review the claim *de novo*, without reference to § 2254(d). However, this does not help Weeks with his claim. If § 2254(d) does not apply, the "new rule" analysis of *Teague* would apply. Whether reviewed under the *Teague* and *Gray* analysis, or under § 2254(e), the rule sought by Weeks cannot be applied to his case on habeas.

petitioner would require declaring a "new rule," such a rule could not have been clearly established federal law, as determined by the Supreme Court, at the time the state made its decision in this case.

Because this court could not find in Week's favor on his claim that he was denied due process when the trial court refused to provide expert assistance, expert assistance is not "reasonably necessary" for this proceeding.

B. Standard of Review Under the AEDPA

The court agrees with and hereby adopts the Magistrate Judge's interpretation of the standard of review under the Antiterrorism and Effective Death Penalty Act of 1996. *See* R & R at 44–52. As each of petitioner's arguments, which underlie his current objections to the Magistrate Judge's interpretation of the AEDPA, were thoroughly discussed in the R & R, this court sees no reason to simply repeat petitioner's arguments as well the court's rejection of them as meritless.[28] However, for the sake of clarity, the court will briefly summarize the applicable standard of review.

The AEDPA is generally applicable to Weeks' case, because his petition was filed well after the April 24, 1996, enactment date of the Act. *See Lindh v. Murphy*, 521 U.S. 320, ——, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997) (holding that the new provisions of chapter 153 generally apply to cases filed after the [AEDPA] became effective).[29] The newly amended 28 U.S.C. § 2254(d) establishes the standard of review to be applied by a federal court considering a state prisoner's petition for habeas relief. Section 2254(d) provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[29] A federal district court must first determine whether there is a state decision on the "merits" with respect to a particular claim. Section 2254(d) applies to any claim adjudicated on the merits in state court. Contrary to the argument advanced by petitioner, a decision by a state court that summarily dismisses a petitioner's claim as meritless is an adjudication on the merits within the meaning of § 2254(d). *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir.) (holding that "perfunctory" state court rulings are nonetheless evaluated pursuant to § 2254(d) for reasonableness), *cert. denied*, —— U.S. ——, 118 S.Ct. 72, 139 L.Ed.2d 32 (1997); *see also Parker v. Angelone*, 959 F.Supp. 319, 320 (E.D.Va.1997) (decision by state court summarily dismissing petitioner's claim as "frivolous" is an "adjudication on the merits"); *McLee v. Angelone*, 967 F.Supp. 152 (E.D.Va. 1997) (holding that § 2254(d) does not require an explanatory decision from the state court). The statute only requires the reviewing court to examine the ultimate decisions of the state court and compare that decision to "clearly established federal law."

However, the practical significance of § 2254(d)'s new standard of review will certainly be lessened in cases where the state court offers no explanation for its decision. *See Cardwell v. Netherland*, 971 F.Supp. 997,

28. Weeks had raised the same arguments contained in his objections to the R & R in "Petitioner's Response in Opposition to Respondent's Motion to Dismiss." Petitioner raised a number of arguments regarding the applicability of the AEDPA, as well as its constitutionality.

29. The specific provision of § 107 of the AEDPA, however, is not applicable. Although § 107 contains several provisions pertaining specifically to capital defendants, these provisions are applicable only if the state meets the "opt-in" requirements set forth in § 107. As explained above, Virginia does not meet the qualifications of § 107, thus precluding its applicability to this case. *See supra* part I.A.

1015 (E.D.Va.1997). In cases where there is no indication of *how* the state court came to its decision, it will obviously be more difficult for the federal court to judge whether the ultimate determination *involved an unreasonable application* of federal law. As explained by the Court of Appeals for the Seventh Circuit:

> [O]f course the better the job the state court does in explaining the grounds for its rulings, the more likely those rulings are to withstand further judicial review. That is just realism. It doesn't follow that the criterion of a reasonable determination is whether it is well reasoned. It is not. It is wether the determination is at least minimally consistent with the facts and circumstances of the case.

Hennon, 109 F.3d at 335.

[30] If there is such a qualifying state decision on the merits, the writ shall not be issued unless one of the statutory exceptions is met. Section 2254(d)(1) governs the standard of review for legal claims. A federal court may grant a petition if it finds that the state decision was contrary to clearly established federal law, or involved an unreasonable application of clearly established federal law. This section abrogates the *de novo* review that was required under *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953).[30] As stated by the Magistrate Judge, "the focus of federal court review is now the state court decision that previously addressed the claims rather than the petitioner's freestanding claims themselves." R & R at 46. By changing the focus of review, the Act increases the respect due state decisions.

[31] However, the review of legal claims is still *de novo* in the sense that federal courts must independently determine whether the state court decision is correct under federal law. For this reason, the AEDPA is not unconstitutional as argued by Weeks. The AEDPA does not require any state decision to be upheld where the decision is "contrary to" or is "an unreasonable application of" federal law. Thus, the Act does not eliminate the Judicial power of the federal judiciary to say what the law is, as required by Article III of the United States Constitution.

[32] The AEDPA altered habeas review in a more fundamental way, by mandating a strict choice-of-law rule. In comparing the state decision to clearly established federal law, it is the law "as determined by the Supreme Court of the United States" that prevails. Federal courts are no longer permitted to rely on their own jurisprudence in addition to that of the Supreme Court. Thus, Weeks must be able to point to an authoritative decision of the Supreme Court in order to secure a writ. *See Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir.1996).

Section 2254(d)(2) dictates the standard of review applicable to claims based on pure questions of fact. When a petition for habeas relief is based on a challenge to a factual determination, before granting an application for a writ, the federal court must find that the state decision was based on an *unreasonable* determination of the facts in light of the evidence presented in state court. § 2254(d)(2). In addition, factual determinations made by a State court shall be presumed to be correct and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. § 2254(e)(1).

[33] Petitioner also objects to footnote 20 of the Report and Recommendation. Weeks interprets the R & R as finding that the AEDPA supplants the harmless error standard outlined in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). This court does not read the Magistrate Judge's R & R the same way. The Magistrate Judge simply stated that "[u]nder pre-Act law, this petition would be decided under the standard outlined in [*Brecht*]," which is historically a correct statement. The Judge then briefly explained why most

30. Prior to passage of the AEDPA, review was *de novo* in the strictest sense of that term. Under the *Brown v. Allen* line of cases, insofar as petitions presented questions of law or mixed questions of law and fact, federal courts were required to treat the petitions as a wholly new complaint. Federal courts were required to treat state court adjudications in the particular case as nothing more than a potentially relevant authority from the court of last resort of another jurisdiction. *Brown*, 344 U.S. at 458, 73 S.Ct. 397.

of Weeks' claims could not meet the *Brecht* harmless error standard. He never made any reference to the status of *Brecht* post-AEDPA.

However, to the extent that Weeks is correct in his interpretation of the Report and Recommendation, this court holds that there is nothing in the new law which would overrule or contradict *Brecht*. Under *Brecht*, a petitioner is not entitled to habeas relief based on trial error unless he can establish that it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638, 113 S.Ct. 1710; *see also Watson v. Boone*, 131 F.3d 153, 1997 WL 741165 (10th Cir.1997) (unpublished decision) (applying *Brecht* harmless error standard to trial error in case that was reviewed under AEDPA). Thus, even if Weeks shows that the state court incorrectly found a claim to be meritless, in that the decision was contrary to clearly established federal law, he must still show that the proven trial error was not harmless under the *Brecht* standard of review.

IV. Findings of Fact and Conclusions of Law

Respondent objects to the Report & Recommendation on the ground that the Magistrate Judge erred by finding particular claims reviewable. According to the Commonwealth, Claims I, V, VII, XVIII, XIX, XX, XXII, and XXV should not be reviewed on the merits on federal habeas.

With respect to Claim I, this court has already determined that the claim is not reviewable on the merits. *See supra* part III.A. With respect to Claims V and VII, respondent maintains that Weeks failed to preserve the issue as a federal constitutional claim on direct appeal. It is clearly established law that if a habeas petitioner wishes to claim that a state trial court denied him the due process of law guaranteed by the Fourteenth Amendment, he must have said so in state court. *See Duncan v. Henry*, 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (*per curiam*); *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.) (explaining that in order to preserve the right to collateral review in federal court, petitioner must have fairly presented the substance of the federal claim to the state court), *cert. denied sub nom. Matthews v. Moore*, — U.S. —, 118 S.Ct. 102, 139 L.Ed.2d 57 (1997).

In the present case, there is no question that the Supreme Court of Virginia was alerted to the fact that petitioner was asserting these claims under the United States Constitution, in addition to the Virginia Constitution. For each of the claims, petitioner clearly argued that the trial court's decision constituted a violation of particular provisions of the Constitution of the United States. *See* Br. of Appellant to S.Ct. of Va. at 27–29 (Assigned Error 11 & 12), 22–24 (Assigned Error 3). Accordingly, the Magistrate Judge was correct in reviewing Claims V and VII on the merits.

Respondent also argues that Claim XVIII was not raised as a constitutional issue on direct appeal. However, as with the above claims, petitioner fairly presented the claim as a federal constitutional claim to the Supreme Court of Virginia. Not only did petitioner state in his argument that his rights under the United States Constitution were violated, he also explained how the introduction of hearsay can violate a defendant's Sixth Amendment right to confrontation. *See* Br. of Appellant to S.Ct. of Va. at 41 (Assigned Error 30), 39 (Assigned Error 27, cross referenced in Assigned Error 30).

Respondent maintains that Claims XVIII, XIX, XX, XXII, and XXV raise only questions of state law, and do not rise to the level of federal constitutional claims. It is true that any error in state law or procedure that does not implicate the Constitution or laws of the United States is not reviewable on federal habeas corpus. *See* 28 U.S.C. § 2254(a) ("district court shall entertain an application for a writ of habeas corpus ... only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"). For the following reasons, each of these claims do raise federal constitutional issues.

As to Claim XVIII, respondent cites *Davis v. Greer* for the proposition that a hearsay claim is solely a state law matter, and does not raise a federal constitutional claim. 13

F.3d 1134, 1139 (7th Cir.1994). However, the court in *Davis* held that any violation of the hearsay rule at *sentencing* is a matter of state law, as the Sixth Amendment Confrontation Clause does not apply at sentencing. The Confrontation Clause certainly does apply during trials, and a violation of the hearsay rule can implicate that clause. *Id.* In this case, to the extent that the claim is only a hearsay claim, petitioner clearly argues that the admission of hearsay during *trial* violated his rights under the Constitution. Accordingly, this objection by respondent has no merit.

Similarly, respondent's objections as to the reviewability of Claims XIX and XXII are also without merit. Respondent argues that each of these claims raise evidentiary questions, which according to respondent are only state law issues. According to respondent, the Report & Recommendation "ignores the distinction between a mere error of state law and one that is so egregious as to render the trial fundamentally unfair." Respondent's Obj. to R & R at 7, ¶ 11.

However, it is clear that the violation of a state evidentiary rule can also constitute a violation of the United States Constitution. Respondent fails to realize that, once a constitutional violation is adequately alleged, in order to determine whether the error is merely one of state law or is in fact a violation of the United States Constitution, the court must review the claim on its merits. In reviewing each of the claims, the Magistrate Judge did ultimately hold that none of alleged errors were contrary to, or an unreasonable application of, federal law. As an initial matter, however, the Magistrate Judge correctly held that Weeks adequately presented the factual and legal basis of his federal constitutional claims, so that this court could review the claims on their merits.

For the same reasons, respondent's objection to the court's review of Claim XXV on the merits must also be overturned. In Claim XXV, petitioner argues that the trial court committed error by not submitting a particular instruction to the jury. Respondent argues that this claim is merely a state procedural issue. However, errors relating to jury instructions can clearly rise to the level of a due process violation, depending on the particular circumstances. The Magistrate Judge was correct in finding that Weeks adequately alleged a violation of his federal constitutional rights, so that it may be reviewed on the merits.

In addition to arguing that Claim XX only raises a state law claim, respondent argues that Claim XX is not reviewable because it goes far beyond the limited claim raised on direct appeal. First, as with the above claims, Claim XX also sufficiently alleges a federal constitutional violation. However, this court must agree with respondent's second argument. Although the headings of Assigned Error 20, the claim on direct appeal, and Claim XX are similarly worded, the Commonwealth is correct that the arguments raised under the claims are actually very different.

At trial, evidence was offered to show that the gun used by Weeks in the murder of Trooper Cavazos had also been used by another individual in an earlier murder committed in North Carolina. The evidence showed that Weeks received the gun, knowing both that it had been used in a murder, and that the police were looking for the gun. Thus, the history of the gun was not offered to show that Weeks was involved in the commission of the North Carolina murder. It was offered to show motive, intent, and knowledge in the Cavazos murder.

In Assigned Error 20, Weeks argued that there was insufficient evidence to show that Weeks was an accessory after the fact to the North Carolina murder, and thus the evidence implying as much should not have been admitted. *See* Br. of Appellant to S.Ct. of Va. at 35 (Assigned Error 20). Although present Claim XX relates to admissibility of the same evidence, different arguments are relied upon than were referred to on direct appeal. In Claim XX, petitioner argues that the evidence was irrelevant and that any probative value was outweighed by its prejudicial effect, thus violating his due process rights under the United States Constitution. Petition for a Writ at 125–31. In addition, Weeks argues that jurors received no necessary guidance, direction, or limitations on their consideration of this evidence, and that

this failure conflicts with the due process clause and the Eighth Amendment. *Id.* at 128. None of these issues or arguments were raised in the direct appeal brief. Accordingly, Claim XX was not "fairly presented" to the Supreme Court of Virginia so that the State had the requisite "opportunity to pass upon and correct alleged violations." *See Henry*, 513 U.S. at 365, 115 S.Ct. 887.

In conclusion, the Magistrate Judge's conclusion that Claims V, VII, XVIII, XIX, XXII, and XXV are reviewable on their merits was correct. However, the Magistrate Judge erred in addressing the merits of petitioner's Claim XX, which addressed the admission of evidence related to the history of the gun used in the murder. In addition, as explained earlier, the Magistrate Judge erred in addressing the merits of Claim I. *See supra* part III.A. Accordingly, this court will not address the merits of Claim I or XX, but will address the merits of Claims I, V, VII, XVIII, XIX, XXII, and XXV.

A. Claim V

[34] Petitioner objects to the Magistrate Judge's conclusion that Claim V is without merit. In Claim V, Weeks argues that he was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments when he was not allowed to make an *ex parte* showing on his claim for expert assistance.

The trial judge refused to allow petitioner to make his application for a ballistics expert and forensic pathologist *ex parte*. The Supreme Court of Virginia, held that Weeks' rights were not violated by the denial of an *ex parte* hearing. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (1994).

Under federal criminal procedure, there is clearly a statutory right to an *ex parte* hearing. 18 U.S.C. § 3006A(e)(1). However, the United States Supreme Court has never held that there is a constitutional right to an *ex parte* hearing. In *Ake*, the Court did make a reference to an *ex parte* hearing, but the court did not hold that such a hearing is constitutionally required. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

For these reasons, and the additional reasons stated in the Report and Recommendation, petitioner cannot show that the Supreme Court of Virginia's decision was contrary to, or an unreasonable application of, federal law. Accordingly, this claim is without merit.

B. Claim VII

[35] Petitioner objects to the Magistrate Judge's conclusion that Weeks was not entitled to a Bill of Particulars, and that the Supreme Court of Virginia did not err in upholding the trial court's decision denying Weeks' request for one. The trial court denied petitioner's request for a Bill of Particulars. The Supreme court of Virginia held that a Bill of Particulars was not required under *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227, 232–33 (1991). *See Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (1994).

Weeks makes two distinct arguments supporting his claim: (1) that the mandatory nature of Va.Code § 19.2–266.2 creates a liberty interest in receiving a Bill of Particulars, the denial of which violated his due process rights under the federal Constitution; and (2) the Sixth Amendment entitles a defendant to be informed of the nature and cause of the accusation against him. However, neither argument has merit.

The Supreme Court of Virginia has made clear that § 19.2–266.2 does not entitle a defendant to a Bill of Particulars as a matter of right. *See Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218 (1991) (holding that whether the Commonwealth is required to file a Bill of Particulars is a matter within the discretion of the trial court); *see also Strickler*, 241 Va. 482, 404 S.E.2d 227(1991) (holding that when an indictment is sufficient to give the accused "notice of the nature and character of the offense charged so he can make his defense" a Bill of Particulars is not required). In this case, Weeks never challenged the sufficiency of the indictment. Thus, the trial court judge did not err under Virginia law in denying a Bill of Particulars, and consequently did not deny Weeks any state created liberty

interest, in violation of the due process clause.

Furthermore, there is no constitutional right to a Bill of Particulars. *United States v. Bales*, 813 F.2d 1289 (4th Cir.1987). Weeks was essentially seeking detailed discovery of all of the prosecution's evidence against him. However, he cannot point to any United States Supreme Court case in support of his theory that the denial of a Bill of Particulars was in violation of his rights under the federal Constitution.

For these reasons, and the reasons stated in the Report and Recommendation, petitioner cannot show that the Supreme Court of Virginia's decision was contrary to, or an unreasonable application of, federal law. Accordingly, this claim is without merit.

C. Claim X

Petitioner objects to the Magistrate Judge's conclusion that Weeks cannot meet the required burden with respect to Claim X. Weeks maintains that the trial court's refusal to strike Juror Pama for cause was unreasonable, and deprived Weeks of due process, effective assistance of counsel, and a fair trial.

Juror Pama had a close relative that was shot to death in the course of his duty as a police officer. Weeks argues that Juror Pama's answers during voir dire were ambiguous, and the statements combined with the context of the questioning suggest that he could not be fair and impartial. *See* R & R at 64–65 (for relevant portions of voir dire of Juror Pama). According to petitioner, the context of the questioning by the prosecutor would have put pressure on Pama to strive to be judged "fair and impartial, laudatory attributes." Pet. Obj. at 44. In addition he argues that, "a college graduate working on a Master's degree, knew what answers he had to give to be deemed "fair and impartial." *Id.* at 45. In reviewing this claim, the Supreme Court of Virginia held that the trial court did not commit error in refusing to dismiss Pama for cause. *Weeks*, 450 S.E.2d at 389.

[36] Although this court may have ruled differently than the trial judge if it had presided over the trial, how this court would have ruled is not the relevant standard. It is well-settled that a question of whether a member of the venire should be excluded for cause is a factual finding. *Wainwright v. Witt*, 469 U.S. 412, 429, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *see also Patton v. Yount*, 467 U.S. 1025, 1036–37, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (holding question of individual juror's partiality is one of fact, and state court determination is entitled to presumption of correctness). Under § 2254(e)(1) a determination of a factual issue made by a state court shall be presumed to be correct. This presumption can only be overcome by clear and convincing evidence. Furthermore, the trial judge is in the unique position to directly view and evaluate a juror and this court may not substitute its own judgment upon review of the transcript. *See Maynard v. Dixon*, 943 F.2d 407 (4th Cir. 1991) (holding trial judge has wide discretion in deciding whether to excuse juror for cause and in evaluating a juror's responses, inflections, and gestures).

As pointed out by the Magistrate Judge, there was nothing inherent in Juror Pama's situation that rendered him unable to perform his duties. The trial judge found him to be credible, and believed Pama's statements that he could put aside any prior knowledge or feelings, and that he could render a fair and impartial verdict.[31] Petitioner has not rebutted by clear and convincing evidence the presumption of correctness accorded state findings of fact. For these reasons, and the reasons stated in the Report and Recommendation, Weeks cannot show that the state court's decision was based on an unreasonable determination the facts under § 2254(d)(2). Accordingly, this claim is without merit.

31. The fact that Juror Pama is a graduate student, and thus supposedly "knew what answers he had to give to be deemed 'fair and impartial,'" is clearly not sufficient reason to find him incredible, let alone substitute that determination of credibility for the trial judge's. There is no reason to believe that Pama had an ulterior motive to appear unbiased. More importantly, a review of Pama's answers, if anything, indicate the candor with which he was answering the questions.

D. Claims XI and XII

[37] Petitioner objects to the Magistrate Judge's conclusion that the trial judge did not abuse its discretion in refusing particular proposed voir dire questions pertaining to the jurors' beliefs on life imprisonment and the death sentence. Weeks argues that he should have been allowed to ask two proposed questions: (1) "Do you believe that if the Defendant is sentenced to death that the sentence will be carried out?"; (2) "Do you believe that if the Defendant were sentenced to life imprisonment that he would spend the remainder of his life in prison?"

According to petitioner, these questions were necessary to determine "the possible existence of a belief which could substantially impair the performance of a juror in accordance with the instructions given to him and his oath." Petitioner's Obj. to R & R at 46. The Supreme Court of Virginia held that "the trial court did not abuse its discretion in disallowing [any of the proposed] questions because they were either improper, vague, argumentative, or nonspecific." *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (1994).

In this case, the Supreme Court of Virginia's decision is not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court. The first question was supposedly based on the principles outlined in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). In *Caldwell*, the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328–29, 105 S.Ct. 2633. In that case, the prosecutor had led the jury to believe that ultimate responsibility for the sentencing decision rested with other decision makers who would be reviewing the jury's decision.

In *Weeks'* case, there were no impermissible arguments made to the jury. *Caldwell* does not speak to the appropriateness of questions on voir dire. In fact, the underlying assumption in *Caldwell* seems to be that sentencers normally treat their power to determine the appropriateness of death as an "awesome responsibility." *Id.* at 329, 105 S.Ct. 2633. The issue in *Caldwell* only arose because the state actively altered what would be the normal perception of jurors. In this case, there was no reason to believe that the jurors would not believe they had an "awesome responsibility."

The second question was supposedly designed to find out if jurors believed that a defendant sentenced to life imprisonment would be out within a few years. According to Weeks, a juror who believed accordingly would be more likely to impose death. He maintains that such a question is required under *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), to ensure that all jurors will be able to set aside their views, and follow the judge's instructions and their oaths.

The first and most obvious problem with counsel's argument is that the proposed question does not ask jurors if they believe that a defendant sentenced to life imprisonment will be out in a few years. The question instead asks jurors whether they believe that a defendant with a life sentence would spend the "remainder of his life in prison." This is a very different question. An answer of "no" to the proposed question does not indicate that the juror believes a prisoner will be out in only a few years. A juror could answer "no," that he does not believe such a defendant will spend the rest of his life in prison, because he believes the defendant will be eligible for parole in twenty-five years.[32] In addition, an answer of "no" to the proposed question does not necessarily mean that a juror will be more likely to impose a death sentence regardless of the mitigating evidence offered, or that such a juror would not follow the law, as instructed by the judge.

An adequate voir dire is part of the Sixth Amendment right to an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222,

32. Twenty-five years is, in fact, when Weeks would have been eligible for parole if he had been sentenced to life imprisonment.

119 L.Ed.2d 492 (1992). However, the above question is not required under *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), as claimed by petitioner, to ensure that all jurors will be able to set aside their views, and follow the judge's instructions and their oaths. The trial judge did ask members of the jury panel the following: if "the jury were to convict the defendant of capital murder, would you be able to consider voting for a sentence less than death?" Trial Tr. at 42 (Oct. 18, 1993). This question is standard in capital cases, and is designed to weed out prospective jurors whose "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (internal citation omitted). In addition, the judge asked prospective jurors whether they "know of any reason whatsoever why you could not sit and give a fair and impartial trial to the Commonwealth and to the accused, based solely on the law which I will give you and the evidence that you will hear and see in this courtroom?" Trial Tr. at 43 (Oct. 18, 1993).

The above questions were sufficient to ensure that the jurors would be able to set aside their views, including a view that a life sentence could result in an early release from prison, and follow the judge's instructions and their oaths. For the reasons stated here and in the R & R, the decision to refuse the proposed questions was not contrary to, and did not involve an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Accordingly, this claim is without merit.

E. Claim XIII

[38] Petitioner objects to the Magistrate Judge's conclusion that Claim XIII is without merit. According to Weeks, the trial judge deprived him of due process and a fair trial when he refused to allow certain proposed voir dire questions regarding racial bias. *See* R & R at 73–74 (for list of denied questions).

[39, 40] Petitioner relies on *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), for the argument that his proposed questions should have been allowed. It is clearly established law that Capital defendants accused of an interracial crime are entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. *Id.* at 36, 106 S.Ct. 1683. At the same time, though, the Supreme Court specifically held that the rule is "minimally intrusive; as in other cases ... the trial judge retains discretion as to the form and number of questions on the subject" of race. *Id.* The Supreme Court has indicated that even where inquiry is constitutionally required because of inextricably involved racial issues, confining the questioning to a single brief general question may be "sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain." *Ham v. South Carolina*, 409 U.S. 524, 527, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973) (question "[w]ould you fairly try this case on the basis of the evidence and disregarding the defendant's race" held to be sufficient).

In this case, the trial court did allow two questions on the issue of racial bias that were much more specific than the question referred to in *Ham*: (1) Would you disapprove of a member of your family marrying a person of a different race for that reason only?; (2) Do you believe that persons of African descent are more likely to commit crimes than other persons of other races? Trial Tr. at 52 (Oct. 18, 1993). The judge used his discretion to deny the other proposed questions as open-ended, argumentative, and ineffectual. The Supreme Court of Virginia held that "the trial court did not abuse its discretion, in this case of a white victim and a black accused, in the manner which it questioned the prospective jurors on the subject of potential racial bias." *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (1994) (citing *Turner v. Murray*, 476 U.S. 28, 37, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) for support).

For the above reasons, and the reasons stated in the Report and Recommendation, the Supreme Court of Virginia's decision on this question was not contrary to, or an unreasonable application of, clearly established federal law. Accordingly, this claim is without merit.

F. Claim XIV

[41] Petitioner objects to the Magistrate Judge's conclusion that Claim XIV is without merit. According to Weeks, the trial judge deprived him of due process and a fair trial when he refused to allow certain proposed voir dire questions regarding bias in favor of the death penalty. *See* R & R at 76–77 (for list of denied questions).

Petitioner relies on *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) for the argument that his proposed questions should have been allowed. In *Wainwright*, the Supreme Court held that the proper standard for determining when a prospective juror may be excused for cause because of his views on capital punishment ... is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *Id.* at 424, 105 S.Ct. 844. Accordingly, a defendant has a right to conduct a voir dire adequate to ensure that none of the members of the jury would "unwaveringly impose death after a finding of guilt," regardless of mitigating factors and no matter how instructed on the law. *Morgan v. Illinois*, 504 U.S. 719, 733–34, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

The trial court did allow a number of questions that were related to the imposition of the death penalty and the possibility that a potential juror may not be able to perform his duties in accordance with the instructions and his oath. The judge, however, denied some questions as argumentative, open-ended, and without a sufficient factual basis for the prospective jurors to intelligently respond. The Supreme Court of Virginia upheld the trial judge's decision, holding that the questions were either improper, vague, argumentative, or nonspecific. *Weeks*, 450 S.E.2d at 388.

The questions that were allowed were adequate to identify those who would automatically vote for the death penalty. *See Mackall v. Angelone*, 131 F.3d 442, 451 (4th Cir.1997) (*en banc*), *cert. denied*, — U.S. —, 118 S.Ct. 907, 139 L.Ed.2d 922 (1998). For this reason, and the reasons stated in the Magistrate Judge's Report and Recommendation, petitioner cannot show that the decision of the Supreme Court of Virginia was contrary to, or an unreasonable application of, clearly established federal law. Accordingly, this claim is without merit.

G. Claim XV

Respondent and petitioner have each objected to the Magistrate Judge's analysis of Claim XV. Respondent objects to the Magistrate Judge's conclusion that the second conversation between Special Agent Rowland of the Virginia State Police and Weeks amounted to an interrogation within the meaning of *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).[33] Petitioner objects to the Magistrate Judge's conclusion that the interrogation was not a violation of Weeks' Fifth Amendment right to remain silent.

1. Interrogation

[42] The second conversation between Weeks and Special Agent Rowland clearly constituted an interrogation within the meaning of *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). According to the United States Supreme Court, the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. *Id.* at 300–01, 100 S.Ct. 1682. The Court went on to define what is meant by the phrase "functional equivalent." This term was defined as any "words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response" from the suspect. *Id.* at 301, 100 S.Ct. 1682. This definition is intended to focus the analysis upon the perceptions of the suspect, and not the intent of the police. *Id.*

In this case, defendant was clearly in custody at the time of the second conversation with Agent Rowland. Weeks was read his

33. The Supreme Court of Virginia assumed, without deciding, that the conversation was an interrogation. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 386 (1994).

Miranda rights at approximately 7:40 a.m. on February 24, 1993, by Officer Rowland, who had become suspicious of him during their conversation. Weeks invoked his Fifth Amendment right to remain silent, and questioning immediately ceased. At approximately 7:52 a.m., Weeks was arrested by Rowland, after he had received information that the driver of Weeks' vehicle had identified Weeks as the gunman. From that point on, Weeks remained continually in the custody of the police. At 6:00 p.m., Weeks was brought in handcuffs and leg irons, to the lounge of the local prosector's office where Agent Rowland again spoke with Weeks. It is this last discussion at 6:00 p.m. that is the subject of both parties' objections.

Because Weeks was clearly in custody at the time of the second conversation, the decisive question is whether he was subjected to questioning or its functional equivalent. The relevant facts surrounding the second conversation are as follows: After asking Weeks if he remembered the rights read to him earlier, Rowland proceeded to summarize the investigation through the course of the day's events to that point in time. This summary included telling Weeks that an eyewitness to the shooting had made a positive identification of him as the assailant. In fact, the truth was that a witness had identified defendant as a person she saw at the scene after the homicide, but that she had not actually witnessed the shooting. At the conclusion of this summary, Rowland told Weeks that, "[t]his is your opportunity to provide your explanation as to what happened at the shooting scene." Weeks responded by stating "Yes, I was packing." He then proceeded to confess to the trooper's murder.

The interaction between Weeks and Agent Rowland was clearly an interrogation under *Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297. Apparently, the respondent would have the court find that the final statement by Rowland was not a question, or words designed to elicit a response, simply because there is no question mark at the end of the statement. This court sees no practical difference between what was actually said and the following questions: "Will you take this opportunity to explain what happened at the shooting scene?" or "Do you want to tell me what happened at the shooting scene?" The officer should have known that his statement, indicating that he was providing Weeks with the opportunity to explain his side, and immediately following the recitation of evidence against Weeks, was reasonably likely to elicit an incriminating response. More than likely, Officer Rowland's very intent, or at least hope, was to illicit a confession from Weeks.

The cases cited by the Commonwealth in its supporting brief are inapposite to the question of whether the above interaction constituted an interrogation. First, respondent cites *Ray v. Duckworth*, 881 F.2d 512, 518 (7th Cir.1989), for the proposition that there is nothing objectionable if an officer merely informs a suspect about the nature of the evidence against him. However, whether it is objectionable to inform a suspect about the nature of the evidence against him is not the issue. The issue is whether the officer's statements constituted an "interrogation." The issue in *Ray* was not whether there was an interrogation, but whether the interrogation that took place was coercive. *Id.* In addition, the officer did not merely inform the suspect about the nature of the evidence against him. As explained above, he misrepresented some of the evidence. A deliberately false statement indicates that the officer's intention was not simply to keep Weeks informed about matters relating to the charges against him, as respondent would have this court believe was the case here. *See* Respondent's Brief at 69.

[43] Second, respondent cites *Shedelbower v. Estelle*, 885 F.2d 570 (9th Cir.1989), for the argument that an officer's false statement is not necessarily equivalent to an interrogation. While this may be true, a false statement is also certainly not evidence that there was not an interrogation. If anything, false statements that are deliberately made do indicate an intent to illicit an incriminating response. Although the Supreme Court held in *Innis* that the focus of the inquiry is not on the officer's intent, the officer's intent is also not irrelevant. *See Innis*, 446 U.S. at 302 n. 7, 100 S.Ct. 1682 (holding that an officer's intent "may well have a bearing on

whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response").

2. Fifth Amendment Right

[44] According to petitioner, his Fifth Amendment right to remain silent was violated when Agent Rowland interrogated him at 6:00 p.m. in the Commonwealth Attorney's lounge. The Supreme Court of Virginia held that there was no violation of *Miranda* as a result of the reinterrogation, and the trial court, therefore, did not err in refusing to suppress Weeks' statements. *Weeks*, 450 S.E.2d at 386–87.

In considering this issue on appeal, the Supreme Court of Virginia analyzed the facts of this case under the appropriate standard. *Id.* The court compared the circumstances of Week's interrogation to the five factors the United States Supreme Court had found relevant in determining that a "suspect's right to cut off questioning was scrupulously honored." *See Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

This court finds, for the reasons stated in the Report and Recommendation, that the decision of the Supreme Court of Virginia was not contrary to, or an unreasonable application of, the Supreme Court's decision in *Mosley*. *Id.*

H. Claim XVI

[45] The court agrees with respondent that *Stone v. Powell* bars any review of this claim on the merits. 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) (holding that Fourth Amendment claims are not reviewable by federal courts on habeas petitions). However, the court disagrees with respondent that the Magistrate Judge may have suggested otherwise. Although the Magistrate Judge correctly pointed out that the claim was not procedurally *defaulted* by Weeks, he stated that "[u]nfortunately for Weeks, this claim is clearly barred under the rule in *Stone v. Powell*." Accordingly, this objection by respondent merits no further discussion.

The petitioner objects to the Magistrate Judge's finding that the bar of *Stone* applies in this case, and to his refusal to address the merits of this claim. According to Weeks, *Stone* is inapplicable because his claim addresses the *suppression* of evidence derived from the alleged improper *Terry* stop, and not the legality of the *Terry* stop itself.

This distinction is frivolous. First, the question of whether evidence should have been suppressed obviously cannot be addressed without addressing the legality of the seizure. A review of Weeks' petition proves this point, as his discussion focuses almost entirely on trying to show that the *Terry* stop was an illegal seizure.

Second, this claim is precisely the type of claim *Stone* was addressing. The precise holding of *Stone* was that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained through an unconstitutional search or seizure was introduced at his trial." *Stone*, 428 U.S. at 494, 96 S.Ct. 3037. Weeks' claim is that the failure to suppress all evidence derived from an improperly conducted *Terry* stop deprived him of due process and a fair trial. Accordingly, *Stone* is clearly applicable to Weeks' claim.

The Magistrate Judge correctly found that *Stone* applies to this claim. Because Weeks has not shown that the state failed to provide a full and fair opportunity for litigation, this claim is barred from review on the merits.

I. Claim XVIII

Weeks objects to the Magistrate Judge's conclusion that Claim XVIII lacks merit. Claim XVIII alleges that petitioner was denied various rights under the Constitution due to the Commonwealths' improper questioning of witness Daniels and the trial court's failure to correct those errors.

On cross-examination the defense attorney questioned Daniels as to any benefit he hoped to receive in exchange for his testimony. In response, Daniels stated that he hoped to receive protection from the state. On redirect the prosecutor asked, "why do you feel that you need protection?" To which Daniels replied, "threats have been

made against me by, we can say, Mr. Weeks' admirers." Defense counsel objected to this testimony, and the objection was overruled on the grounds that the defense "opened the door" to this testimony. The Supreme Court of Virginia held that defendant's assignment of error on this issue was without merit. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 390 (1994).[34]

[46, 47] First, it must be noted that Daniels' statement was not hearsay. It was not offered for the truth of the matter asserted, but to explain why Daniels believed he needed protection. And to the extent that the statement may have been prejudicial to Weeks, the defense opened the door to the testimony. For this reason, and the reasons stated in the Report and Recommendation, petitioner has not shown that the Supreme Court of Virginia's decision was contrary to, or an unreasonable application of, federal law. Accordingly, this claim is without merit.

J. Claim XIX

[48] Petitioner objects to the Magistrate Judge's conclusion that Claim XIX lacks merit. Under Claim XIX, Weeks argues that the trial court unreasonably allowed Special Agent Rowland to testify as to Weeks' credibility and ultimate culpability, in violation of his right to a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

During trial, Agent Rowland testified that, while interviewing Weeks, he learned that the driver of Weeks' car, Weeks' uncle, had stated that Weeks had done the shooting. The trial court, over defendant's objection, then allowed Rowland to testify that after learning this information he believed Weeks had not been telling him the truth during his interview of Weeks. The Supreme Court held that Assigned Error 20, which was based on this statement, had no merit. *Weeks*, 450 S.E.2d at 390.[35]

As explained by the Magistrate Judge, "it is clear from the transcript, and would have been clear to the jury, that Rowland was merely stating what was in his mind at the time." R & R at 90. For this reason, and the additional reasons stated in the Report and Recommendation, the petitioner has failed to show that the decision of the Supreme Court of Virginia was contrary to, or an unreasonable application of, federal law. Accordingly, this court finds that this claim is without merit.

K. Claim XXII

[49] Petitioner objects to the Magistrate Judge's conclusion that Claim XXII lacks merit. In Claim XXII, Weeks argues that the trial judge erred by allowing the prosecution to enter into evidence the criminal records of this former co-defendants, during the penalty phase of his trial. According to Weeks, this evidence violated his due process rights under the Constitution because the evidence was irrelevant and inflammatory.

In attempting to show future dangerousness, one of the statutory aggravating factors that can trigger a sentence of death, the Commonwealth presented evidence concerning Weeks' 1992 conviction for drug trafficking. The Commonwealth's witness, M.W. Casey, a North Carolina Detective, was allowed to testify about the records of Weeks' co-defendants in that case, over Weeks' objection. The trial court allowed the testimony to show the "background and environment" in which he operated his business. The Supreme Court of Virginia, held that this issue was without merit. *Weeks*, 450 S.E.2d at 390.[36]

[50] The admissibility of evidence is generally a matter of state law. "Absent a showing that the admission of the evidence violated a specific constitutional guarantee, a federal court can issue a writ of habeas cor-

34. This is one of the miscellaneous evidence claims that was dismissed as meritless without any discussion by the Supreme Court of Virginia.

35. This is one of the miscellaneous evidence claims that was dismissed as meritless without any discussion by the Supreme Court of Virginia.

36. This is one of the miscellaneous evidence claims that was dismissed as meritless without any discussion by the Supreme Court of Virginia.

pus on the basis of a state court evidentiary ruling only when that ruling violated the defendant's right to due process by denying him a fundamentally fair trial." *Milone v. Camp*, 22 F.3d 693, 702 (7th Cir.1994). The petitioner has not shown that the admission of evidence was so prejudicial that it fatally affected the sentencing phase and deprived him of a fair trial. Moreover, the trial court's determination that the evidence was relevant to future dangerousness was not an unreasonable application of federal law.

For these reasons, and the reasons stated in the Report and Recommendation, petitioner has failed to show that the state court's decision was contrary to, or an unreasonable application of, federal law. Accordingly, this court finds that this claim is without merit.

L. Claim XXV

[51] Petitioner objects to the Magistrate Judge's conclusion that Claim XXV is without merit. Weeks claims that the trial court violated his due process rights and his right against cruel and usual punishment by responding inappropriately to a jury question.

During deliberations, the jury asked the following question: "Does the sentence of life imprisonment in the State of Virginia have the possibility of parole, and if so, under what conditions must be met [sic] to receive parole?" The trial court responded by telling the jury, "You should impose such punishment as you feel is just under the evidence, and within the instructions of the Court. You are not to concern yourself with what may happen afterwards." Weeks objected to this response, proposing that the court instead instruct the jury to presume that their sentence would be carried out.[37] The trial court overruled this objection. On direct appeal, the Supreme Court of Virginia denied this issue as meritless. *Weeks*, 450 S.E.2d at 390.[38]

For the reasons stated in the Report and Recommendation, petitioner cannot show that the state court decision was contrary to, or an unreasonable application of, federal law, as determined by the United States Supreme Court.

M. Claims XXVI and XXVII

[52] These claims, as well as the next two, are closely related. Each of the claims call into question whether the jury was adequately informed on the effect it could give to mitigating evidence. More specifically, petitioner maintains that the jury was mislead into believing that, if they found the presence of an aggravating factor, they did not have to consider mitigating evidence, and that they had to impose the death penalty.

In Claim XXVI, petitioner maintains that his constitutional rights were violated when the trial court refused the following proposed jury instruction: "Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the Defendant to life in prison." In Claim XXVII, petitioner argues that his rights were further violated when the court, instead of reading Weeks, proposed instruction, gave the following instruction:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death; or, if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment....
>
> If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the

37. The court notes that, in his objection, petitioner focuses on a different aspect of this claim: The fact that he was denied the opportunity to present his own accurate evidence regarding his ineligibility for parole for a minimum of 25 years. As explained by the Magistrate Judge, this issue was procedurally defaulted by petitioner because it was never presented to the Supreme Court of Virginia. *See* R & R at 98–99. Accordingly, this particular portion of Claim XXV was not, and cannot be, addressed on the merits.

38. This is one of the miscellaneous evidence claims that was dismissed as meritless without any discussion by the Supreme Court of Virginia.

punishment of the defendant at life imprisonment....

According to Weeks, a juror reading the first clause, of the first paragraph, might believe that he could impose the death penalty upon a finding of an aggravating factor, without having to consider any evidence in mitigation. *See Penry v. Lynaugh*, 492 U.S. 302, 317–18, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (a sentencer may not be precluded from considering, and may not refuse to consider any constitutionally relevant mitigating evidence). Weeks also maintains that the word "or," combined with the language of the second clause, could lead a juror to believe that he could not sentence Weeks to life imprisonment once the jury found an aggravating factor. This interpretation is possible if a juror understood the words "is not justified" to mean that the defendant is not eligible for the death penalty. *See Buchanan v. Angelone*, — U.S. —, ——-—, 118 S.Ct. 757, 764–65, 139 L.Ed.2d 702 (1998) (Breyer, J., dissenting).

[53] Weeks' proposed jury instruction is certainly a clearer statement of the law than the instruction actually given to the jury. However, the issue is whether the instruction given was unconstitutional, not whether alternative instructions would have been better. The governing principle is that restrictions on the jury's sentencing determination must not preclude the jury from being able to give effect to mitigating evidence. *See Buchanan*, — U.S. at —, 118 S.Ct. at 761. The standard for determining whether jury instructions satisfy this principle is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* (citing *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)).

The Supreme Court has just recently applied the above standard to the very jury instruction at issue in this case. *See Buchanan*, — U.S. —, 118 S.Ct. 757, 139 L.Ed.2d 702. The precise issue advanced to the Supreme Court, in *Buchanan*, was whether the absence of a general instruction on the concept of mitigation, and of instructions on particular statutorily defined mitigating factors, violated the Eighth and Fourteenth Amendments to the United States Constitution. *Id.* Thus, the respondent, in this case, was technically correct in pointing out that the Supreme Court did not grant the petition for writ of certiorari on the precise questions at issue before this court.

However, in deciding whether the absence of the requested mitigation instructions violated Buchanan's rights under the Constitution, the Court focused on the instruction that was given to determine if that instruction satisfied the requirements under the constitution. *Id.* 118 S.Ct. at 762–63. The instruction that was given in Buchanan's trial is the same Virginia capital pattern sentencing instruction that was given in Week's trial.

The Supreme Court specifically held that the instruction did not violate any constitutional principles, and that it did not foreclose the jury's consideration of any mitigating evidence. *Buchanan*, — U.S. at —, 118 S.Ct. at 762. The Court further held, in pertinent part:

> The instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they "may fix" the penalty at death, but directed that if they believed that all the evidence justified a lesser sentence then they "shall" impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved.

Id. 118 S.Ct. at 762.[39] In addition, the Supreme Court denied the argument that

39. It should be noted that the precise question at issue in this case was not raised before the Supreme Court until oral argument in the *Buchanan* case. *Id.* 118 S.Ct. at 762 n. 4. At trial both Buchanan and the Commonwealth agreed that the court should instruct the jury with Virginia's pattern capital sentencing instruction, the same instruction given in this case. Although the defense had requested several additional jury instructions on particular mitigating factors, he did not object to the instruction given. The claim raised here was also never raised prior to oral argument in the Supreme Court proceedings. Accordingly, the precise claim raised here was clearly waived by Buchanan, as pointed out by the Supreme Court. *Id.* However, regardless of whether Buchanan had technically waived the issue, the Supreme Court did ultimately rule on the claim.

Eighth Amendment requires the court to instruct the jury on its obligation and authority to consider mitigating evidence. *Id.* 118 S.Ct. at 761.

Pursuant to the Supreme Court's holding in *Buchanan*, this court has no choice but to hold that the trial court did not err by giving the instruction in question to the jury. Furthermore, as the given instruction was sufficient under the Constitution, Weeks' proposed jury instruction was unnecessary. Thus, the trial court did not err by refusing the proposed instruction. For these reasons, petitioner has not shown that the decision of the Supreme Court of Virginia was contrary to, or an unreasonable application of, clearly established federal law. Accordingly, this court denies both claims.

N. Claim XXVIII

[54] Petitioner objects to the Magistrate Judge's conclusion that Claim XXVIII has no merit. This claim is closely related to, although different from, Claims XXVI and XXVII. In this claim, Weeks argues that when the jurors asked whether they could sentence Weeks to life in prison even if they find a statutory aggravating factor, the trial court erred by simply referring them to the jury instruction they had already been given. Weeks maintains that in the face of actual confusion by the jurors, the trial court had a duty to clarify its prior instruction.

> The jury question read as follows:
>
> If we believe that Lonnie Weeks, Jr., is guilty of at least one of the aggravating alternatives, then is it our duty as a jury to *issue* the death penalty? Or, must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty or one of the life sentences? What is the rule? Please clarify.

Over Weeks' objection, the trial judge responded by simply referring the jury to the instruction that had already been given to them, the same instruction discussed above in regard to Claims XXVI and XXVII. On appeal, the Supreme Court of Virginia held that this claim had no merit. *Weeks*, 450 S.E.2d at 390.[40]

The Magistrate Judge found that "[b]ecause this Court has already held that this jury instruction was constitutionally sufficient ... the trial judge did not err in referring the jury to the same instruction when the question arose." R & R at 109. The trial judge could have reasonably assumed that the jury members would understand their charge if their attention were brought to the specific instruction that governed their question. It is further reasonable to assume that if a second reading of the passage failed to clear up the jury's question, the jury would have issued another question. In this case, the jury did not issue any additional questions, which indicates that they understood the instruction and the governing law, once their attention was brought to the applicable instruction.

Accordingly, the petitioner has failed to show that the decision of the Supreme Court of Virginia was contrary to, or an unreasonable application of, federal law. Thus, this court finds that this claim is without merit.

O. Claim XXIX

To the extent that this claim consists of an argument that the trial judge misapplied Va. Code § 19.2-264.5, that portion of the claim is not reviewable here, as it is a question of state law. The other portion of the claim is that the trial judge erred by not imposing a sentence of life imprisonment because the jury clearly did not understand the law in selecting the appropriate sentence. Petitioner bases this claim on his argument that the Virginia pattern capital jury instruction was unconstitutional and that the jury indicated they did not understand the law. This claim has been adequately addressed in the two previous sections.

For the reasons stated previously, as well as the reasons stated in the Report and Recommendation, petitioner has not shown that the decision of the Supreme Court of

40. This is one of the miscellaneous jury instruction claims that was dismissed as meritless without any discussion by the Supreme Court of Virginia.

Virginia was contrary to, or an unreasonable application of, federal law. Accordingly, this court finds that this claim is without merit.

P. Claim XXXIV

Weeks objects to the Magistrate Judge's recommendation that Claim XXXIV is without merit. Claim XXXIV states that the imposition of the death penalty against Weeks was arbitrary and capricious and violated Weeks' rights under the constitution. According to petitioner, "the combination of errors which pervade Mr. Weeks' trial make the imposition arbitrary and capricious."

For the reasons stated in the Report and Recommendation, and based on this court's determination of the petitioner's various individual claims, the court finds that this claim is without merit.

Q. Recommendation on Certificate of Appealability

The Magistrate Judge recommended that this Court decline to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. Petitioner objects to this recommendation. Weeks first points out that he has not yet applied to the district court for a certificate of appealability as to any issue. He further maintains that, under 28 U.S.C. § 2253(c), unsuccessful habeas petitioners are required to request such certificates from the Court of Appeals, and not the District Courts.

Petitioner's second argument points out the dichotomy between the Fed.R.App.P. 22(b) and 28 U.S.C. § 2253(c) Rule 22(b) states, in pertinent part:

> In a habeas corpus proceeding in which the detention complained of arises out of process issued by State court, appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code.

However, 28 U.S.C. § 2253(c)(1) states, in pertinent part:

> Unless a *circuit justice or judge* issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .

(emphasis added).

Although both provisions were amended on April 24, 1996, pursuant to the AEDPA, the language of Rule 22(b) no longer tracks the language of § 2253. Prior to the changes, § 2253 provided that "an appeal may not be taken . . . *unless the judge who rendered the order in the habeas corpus proceeding*, or a circuit justice or judge, issues a certificate of probable cause." (emphasis added). The amendment in 1996 took out the reference to the district court judge who rendered the order. However, the only change made to Rule 22(b) was the replacement of the phrase "certificate of probable cause" with the phrase "certificate of appealability."

Although the Fourth Circuit has not yet addressed this issue, at least two Circuits have, concluding that Congress did intend for district court judges to have continued authority to issue certificates of appealability, under the Antiterrorism and Effective Death Penalty Act (AEDPA). *See, e.g., Houchin v. Zavaras*, 107 F.3d 1465 (10th Cir.1997); *Hunter v. United States*, 101 F.3d 1565, 1577–83 (11th Cir.1996). Both courts found that the word "circuit" in § 2253 only modifies "justice," and not "judge," which would in turn include both district judges and circuit judges. *Id.*

This court, however, declines to decide this issue, as it is not yet ripe. Until petitioner applies to this court for a certificate of appealability, this court will not determine whether it has the authority to issue such a certificate.

Conclusion

The court, having examined the objections to the Magistrate Judge's Report, and having reviewed the record and made *de novo* findings with respect to the portions objected to, does hereby ORDER that the petition be DENIED AND DISMISSED in its entirety, and that respondent's Motion for Summary Judgment be GRANTED.

The Clerk shall mail a copy of this order to counsel for petitioner and respondent.

It is so ORDERED.

MEMORANDUM OPINION AND ORDER

This matter is before the court on petitioner's motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. For the reasons set forth below, this motion is DENIED.

On April 1, 1998, this court issued its Opinion and Final Order in this case, granting respondent's motion for summary judgment and dismissing Weeks' petition for a writ of habeas corpus. On April 15, 1998, petitioner filed a motion to alter or amend judgment. Respondent responded in opposition to petitioner's motion on April 24, 1998. On May 1, 1998, petitioner filed a reply brief in support of his motion to alter or amend judgment.

According to petitioner, this court's Opinion and Final Order contains a factual error that prompted an incorrect determination of governing law, and which bears upon the court's resolution of the motion for summary judgment. Specifically, petitioner contends that this court committed a factual error in rejecting Claim VII of his federal habeas petition. He alternatively argues that this court committed a legal error in its application of Virginia law to the facts of this case.

Under Rule 59(e) of the Federal Rules of Civil Procedure, a district court may "rectify its own mistakes in the period immediately following the entry of judgment." *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982). The Fourth Circuit Court of Appeals has held that Rule 59(e) permits a court to amend a judgment for three reasons: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *Equal Employment Opportunity Comm'n v. Lockheed Martin Corp., Aero & Naval Systems*, 116 F.3d 110, 112 (4th Cir. 1997).

The court finds that there has been no error as to either the facts or the final decision to dismiss Weeks' petition. Accordingly, the court DENIES petitioner's motion to amend or alter the court's judgment. The court will, however, clarify its reasons for finding that Claim VII is without merit.

On June 7, 1993, petitioner filed his initial motion for a bill of particulars. The trial court denied the request. On October 1, 1993, Weeks filed a renewed motion for a bill of particulars, pursuant to the provisions of Virginia Code § 19.2-266.2. This renewed motion was filed simultaneously with two pre-trial motions to suppress evidence. The renewed motion specifically sought disclosure of particulars relevant to his suppression motions.

[55] Section 19.2-266.2 of the Virginia Code provides a deadline for filing motions or objections seeking the suppression of evidence or the dismissal of a warrant, information, or indictment. The statute also provides that "[t]o assist the defense in filing such motions or objections in a timely manner, the trial court shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2-230." Weeks made two distinct arguments supporting his claim that the trial court erred in denying his motions for a bill of particulars. Only one, however, is relevant to this motion to amend or alter judgment: that the mandatory nature of Va.Code § 19.2-266.2 creates a liberty interest in receiving a bill of particulars, the denial of which violated his due process rights under the federal Constitution.

In recommending that this claim is without merit, the Magistrate Judge found that Va. Code § 19.2-266.2 cannot be construed to provide an absolute right to a detailed bill of particulars in every case. This decision was based on the fact that the statute does not mandate that the bill of particulars contain every detail, or any particular details of the case, and if a defendant finds that a bill of particulars is inadequate, he must show "good cause" in order for the court to order supplementation. The Magistrate Judge concluded that the requirement of a bill of particulars is thus, in essence, in the discretion of the court.

There are additional reasons, however, for holding that the decision to order a bill of particulars is discretionary. Petitioner maintains that the Virginia cases cited by this court [1] only apply to requests made under Va.Code § 19.2-230, which has discretionary language, and not § 19.2-266.2. Section 19.2-230 provides that a court of record *may* direct the filing of a bill of particulars at any time before trial. However, the Supreme Court of Virginia has never held that a bill of particulars is mandatory when requested under § 19.2-266.2. In Weeks' case, the Supreme Court of Virginia found that the trial court had committed no error with respect to both requests for bills of particulars. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (1994).

Petitioner focuses on the word "shall" in § 19.2-266.2. The statute, though, also provides that a bill of particulars is to be directed "*pursuant to* § 19.2-230." There is no debate that a bill of particulars under § 19.2-230 is discretionary. Accordingly, it is reasonable to interpret § 19.2-266.2 as requiring a trial court to order a bill of particulars, if, in its discretion, the trial court finds it necessary to assist the defense in filing suppression motions.

[56] However, even if a trial court must order the government to file a bill of particulars in all cases in which one is requested pursuant to § 19.2-266.2, it is only a violation of state law not to do so. It is not the deprivation of a constitutional right, nor is it a violation of any federal law. There is no federal constitutional right to a bill of particulars. *United States v. Bales*, 813 F.2d 1289 (4th Cir.1987) (holding the granting of one is within the sound discretion of the trial judge).

Petitioner does not deny that there is no general constitutional right to a bill of particulars. He instead argues that the language of § 19.2-266.2 creates a liberty interest that is protected by the due process clause of the Fourteenth Amendment. According to petitioner, he had a vested right to receive a bill of particulars related to suppression "which cannot be deprived absent due process." Pet's Br. at 7. This claim is wholly without merit. Petitioner cites to no Supreme Court cases which support his argument that a state created right to a bill of particulars is the kind of "state-created liberty interest" protected by the Due Process Clause of the Fourteenth Amendment.

The cases relied on by petitioner, *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989), and *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983), pertain only to state-created liberty interests in the prison context. Moreover, both cases have been overruled in large part by a recent Supreme Court decision. *See Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). In *Sandin*, the Supreme Court held that while states may create liberty interests which are protected by the Due Process Clause, those interests will be generally limited to freedom from restraint that imposes atypical and significant hardships on the inmate in relation to the ordinary incidents of prison life. *Sandin*, 515 U.S. at 484, 115 S.Ct. 2293.[2] In addition, all of these cases deal with the question of when procedural due process is owed a prisoner.[3]

1. *See Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218 (1991) (holding that whether the Commonwealth is required to file a bill of particulars is a matter within the discretion of the trial court); *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227 (1991) (holding that when an indictment is sufficient to give the accused "notice of the nature and character of the offense charged so he can make his defense" a bill of particulars is not required).

2. Under prior case law, a prison inmate only had to point to mandatory language and substantive predicates, in a state statute or regulation pertaining to prisoners, to establish that the state created a constitutionally protected liberty interest. *See Hewitt v. Helms*, 459 U.S. 460, 470-72, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983).

3. There is no question that petitioner was afforded *procedural* due process, even assuming that the state statute creates a liberty interest, as he was afforded a hearing on the merits of his motion for a bill of particulars. Procedural due process simply ensures that government entities grant individuals the proper procedure, usually notice and an opportunity to be heard, before depriving them of a protected property or liberty interest. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). What petitioner seems to be arguing is that the state statute has created a liberty interest protected by *substantive* due process.

4. Moreover, even if the trial court was in error, petitioner cannot meet the *Brecht* harmless error standard. *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (holding that a petitioner is not entitled to habeas relief based on a trial error unless he can establish that it had a "substantial and injurious effect or influence in determining the jury's verdict"). A review of the record in this case makes clear that, even if the court erred, the error did not have a substantial and injurious effect on the trial process. This is particularly true because most of the requested particulars were within Weeks' own personal knowledge.

1. J.D. Netherland, the original respondent, is no longer the warden of the facility where Chichester is confined. S.V. Pruett is the current Warden.

For the above reasons, the Supreme Court of Virginia's decision regarding the requests for a bill of particulars was not "contrary to," nor did it involve "an unreasonable application of", clearly established federal law, as determined by the Supreme Court of the United States.[4] Accordingly, the court DENIES petitioner's motion to amend or alter judgment in this case.

The Clerk is DIRECTED to send a copy of this Memorandum Opinion and Order to counsel for petitioner and respondent.

It is so ORDERED.

Thomas Lee ROYAL, Jr., Petitioner,

v.

J.D. NETHERLAND, Warden [1], Respondent.

Civil Action No. 3:96CV956.

United States District Court, E.D. Virginia, Richmond Division.

May 5, 1998.

After his conviction for capital murder and sentence of death were affirmed on direct appeal, 250 Va. 110, 458 S.E.2d 575, and his state petition for writ of habeas corpus was dismissed, petitioner sought federal habeas corpus relief. Respondent moved to dismiss, and the District Court, Merhige, J., held that: (1) petition, which was filed after effective date of Antiterrorism and Effective Death Penalty Act (AEDPA) was governed by substantive changes to standards of review effected by ADEPA; (2) death sentence did not violate individualized sentencing procedures required by Federal Constitution; (3) counsel was not ineffective in failing to assert defenses based on intoxication, lack of intent, or claim that defendant was not "trigger-man"; (4) entry of guilty plea resulted in waiver of all defenses other than those that were jurisdictional; and (5) majority of claims asserted were procedurally defaulted.

Motion granted, and petition denied.

1. Habeas Corpus ⇐205

Federal habeas corpus petition which was filed after effective date of Antiterrorism and Effective Death Penalty Act (AEDPA) was governed by substantive changes to standards of review effected by ADEPA, even though petitioner contended that his state habeas corpus petition was pending on AEDPA's effective date, and that he went through state proceedings with assumption that he would enter federal habeas review under former standards. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⇐364, 366, 378

Claims asserted by federal habeas corpus petitioner whose state death sentence had been affirmed were "exhausted," so that merits of claims could potentially be addressed, where claims had either been presented to Virginia Supreme Court on direct appeal or on state habeas petition, or had not ever been presented to Supreme Court and could not now be presented because they were time-barred. 28 U.S.C.A. § 2254(b); Va.Code 1950, §§ 8.01-654, subd. B, par. 2, 8.01-654.1.

Copr. © West 1999 No Claim to Orig. U.S. Govt. Works

450 S.E.2d 379
(Cite as: 248 Va. 460, 450 S.E.2d 379)

Lonnie WEEKS, Jr.,
v.
COMMONWEALTH of Virginia.

Record No. 940335.

Supreme Court of Virginia.

Nov. 4, 1994.

Defendant was convicted in the Circuit Court, Prince William County, Herman A. Whisenant, Jr., J., of grand larceny and firearms charges, and capital murder, and was sentenced to death. On automatic death penalty review, the Supreme Court, Compton, J., held that: (1) two-hour detention while defendant was being questioned by police officers occurred pursuant to defendant's consent and defendant's questioning after prior invocation of right to remain silent did not violate his Fifth Amendment rights; (2) trial court did not err in refusing to dismiss juror for cause; (3) victim impact testimony is relevant to punishment in capital murder prosecution; and (4) death sentence was appropriate under the circumstances.

Affirmed.

[1] CRIMINAL LAW k1134(3)
110k1134(3)
On review of death sentence, court considers not only trial errors enumerated by defendant but also whether sentence of death was imposed under influence of passion, prejudice, or any other arbitrary factor, and whether sentence is excessive or disproportionate to penalty imposed in similar cases. Code 1950, § 17-110.1, subd. A.

[2] CRIMINAL LAW k1130(5)
110k1130(5)
Supreme Court would not consider assigned errors which defendant had not briefed or argued.

[3] CRIMINAL LAW k412(4)
110k412(4)
Defendant's two-hour detention while being questioned by police officers did not violate Fourth Amendment; defendant consented to detention and generally agreed to cooperate with police, he consented to initial "pat down," acquiesced to questioning, accepted invitation to enter police car, agreed not to go to service station for food and drink, acquiesced to second and third "pat down" of trouser pockets and agreed to be interviewed alone in motel room by officer. U.S.C.A. Const.Amend. 4.

[4] CRIMINAL LAW k412.1(1)
110k412.1(1)
Defendant's prior election to remain silent was scrupulously honored and thus statements to police officer were admissible; defendant was carefully advised before initial interview of his right to remain silent and there was immediate cessation of interview when defendant exercised right to silence, ten hours had passed between first and second interviews during which time defendant confessed and even though fresh set of Miranda warnings was not given before second interview, defendant responded affirmatively when asked whether he remembered "rights" read to him earlier, and he readily and freely discussed matter with investigator and did not revoke valid waiver. U.S.C.A. Const.Amend. 5.

[5] CRIMINAL LAW k412.1(4)
110k412.1(4)
In determining whether continued questioning is appropriate after initial refusal to answer questions, factors include whether defendant was carefully advised before initial interrogation that he was under no obligation to answer any questions and could remain silent if he wished, whether there was immediate cessation of initial interrogation and no attempt to persuade defendant to reconsider position, whether police resumed questioning only after passage of significant period of time, whether Miranda warnings preceded second questioning, and whether second interrogation was limited to crime that had not been subject of earlier interrogation. U.S.C.A. Const.Amend. 5.

[6] CRIMINAL LAW k412.1(4)
110k412.1(4)
Mere fact that second interview, after defendant's prior election to remain silent, involves some of same subject matter discussed during initial interview did not render confession constitutionally invalid; defendant was advised of new facts that had been developed by investigators and there was no effort to persuade defendant against his will after he initially invoked right to silence by repeating questions about same subject matter covered earlier. U.S.C.A. Const.Amend. 5.

[7] CRIMINAL LAW k627.6(6)
110k627.6(6)
Denial of defendant's motion seeking copies of any criminal records pertaining to himself, codefendant and probable witnesses who were nonresidents did not prejudice defendant's right to fairly depend himself; many of those named in motion did not testify at trial, and trial court had already ordered prosecutor to furnish defendant before trial with criminal history information concerning any witness to be called by prosecutor at any hearing in or trial of case. Code 1950, § 19.2-389.

[8] CRIMINAL LAW k897(1)
110k897(1)
Defendant procedurally defaulted on issue trial court's ruling on motion for scientific investigation; trial court never denied motion but instead stated it would entertain motion later upon defense showing that defendant had unsuccessfully sought results of testing that should probably already had been conducted by division of forensic sciences, and defense counsel did not object to ruling but instead withdrew motion as not being timely. Sup.Ct.Rules, Rule 5:25.

[9] COSTS k302.2(2)
102k302.2(2)
Defendant charged with capital murder is not entitled to ex parte hearing on his motion for expert assistance.

[10] INDICTMENT AND INFORMATION k121.1(7)
210k121.1(7)
Where no challenge was made to sufficiency of indictment, bill of particulars was not required.

[11] JURY k131(13)
230k131(13)
Defendant has no right to individual voir dire.

[12] JURY k131(15.1)
230k131(15.1)
Trial court did not abuse its discretion in disallowing questions during voir dire because questions were improper, vague, argumentative or nonspecific.

[13] JURY k131(8)
230k131(8)
In capital murder case involving white victim and black accused, trial court did not abuse its discretion in manner in which it questioned prospective jurors on subject of potential racial bias.

[14] CRIMINAL LAW k1158(3)
110k1158(3)
On appellate review, Supreme Court must give deference to trial court's decision whether to exclude or retain prospective juror because trial court "sees and hears the juror"; trial court's decision will be disturbed only upon showing of manifest error.

[15] JURY k97(2)
230k97(2)
In case in which defendant was accused of fatally shooting police officer, trial court did not commit manifest error in refusing to dismiss for cause juror who answered "I think so" in response to question as to whether he could be fair and impartial and set aside anything he might have heard in the past and be fair to both Commonwealth and accused, despite fact that juror had relative who was police officer and killed in the line of duty.

[16] CRIMINAL LAW k1043(2)
110k1043(2)
Defendant could not challenge on appeal admissibility of victim impact evidence by nonfamily members closely associated with victim where objection at trial did not distinguish between testimony by family members and testimony from other sources. Sup.Ct.Rules, Rule 5:25.

[17] CRIMINAL LAW k1208.1(6)
110k1208.1(6)
Victim impact testimony is relevant to punishment in capital murder prosecution in Virginia.

[18] CRIMINAL LAW k419(3)
110k419(3)
Hearsay rule does not operate to exclude evidence of statement offered for mere purpose of explaining conduct of person to whom it was made, particularly when evidence was not offered for purpose of establishing guilt or innocence of accused but for purpose of showing reason for police officer's action in arresting him.

[19] CRIMINAL LAW k419(3)
110k419(3)
Police officer's statement that codefendant had stated to another investigator that defendant "did in fact shoot the trooper," was not inadmissible hearsay where statement was offered to explain officer's action in arresting defendant 12 minutes after defendant was considered not to be in custody, rather than to prove that defendant had in fact shot trooper.

[20] HOMICIDE k269
203k269
Whether defendant is guilty of premeditated killing of victim is usually a jury question.

[21] HOMICIDE k14(2)
203k14(2)
Intention to kill need not exist for any specified length of time prior to actual killing; design to kill may be formed only a moment before fatal act is committed provided the accused had time to think and did intend to kill.

[22] HOMICIDE k156(1)
203k156(1)
In deciding premeditation element of capital murder, jury may consider among other things brutality of attack and whether more than one shot was fired.

[23] HOMICIDE k232
203k232
Evidence supported element of premeditation required for offense of capital murder; defendant was on probation, riding in stolen vehicle and possessing weapon shown to have been used in previous murder, defendant shot trooper at virtually point-blank range at least six times in order to avoid arrest, and location of bullet wounds indicated that trooper may have been fired upon while lying on pavement.

[24] HOMICIDE k357(11)
203k357(11)
Defendant's conduct in committing offense involved depravity of mind and or aggravated battery as required for "vileness" predicate for death sentence; record supported conclusion that death sentence was appropriate for defendant convicted of shooting of trooper six times from close range with high-powered revolver, two shots being independently fatal, officer posed no threat to defendant in connection with routine traffic stop, trooper died with service revolver still in holster, and defendant left and returned to scene, falsely claiming he attempted to render assistance to victim when real purpose was to retrieve incriminating evidence.

[25] HOMICIDE k357(8)
203k357(8)
Imposition of death sentence for defendant who repeatedly shot trooper at close range in attempt to avoid arrest was not excessive or disproportionate to offense considering punishment generally imposed for similar conduct. Code 1950, § 17-110.1, subd. C, par. 2.

****382** William J. Baker, Daniel J. Morissette, Manassas (DePolo & Morissette, on brief), for appellant.

Robert H. Anderson, III, Asst. Atty. Gen. (James S. Gilmore, III, Atty. Gen., on brief), for appellee.

Present: All the Justices.

COMPTON, Justice.

On February 24, 1993, Virginia State Trooper Jose M. Cavazos was shot and killed by defendant Lonnie Weeks, Jr., in Prince William County. Subsequently, defendant was indicted for the felonious, willful, deliberate, and premeditated homicide of the law enforcement officer, when such killing was for the purpose of interfering with the performance of the trooper's official duties.- Code § 18.2-31(6). Defendant also was charged with grand larceny of a motor vehicle, Code § 18.2-95, and use of a firearm in the commission of murder, Code § 18.2-53.1.

Following several pretrial hearings, including a hearing on defendant's motion to suppress his confession, defendant was tried by a single jury during five days in October 1993. As the trial began, defendant pled guilty to the grand larceny and firearm charges. The court subsequently sentenced defendant to imprisonment for ten-year and three-year terms respectively on those charges.

The jury found the defendant guilty of the capital murder charge and, during the second phase of the bifurcated capital proceeding, the jury fixed the defendant's punishment at death for the capital offense based upon the vileness predicate of the capital murder sentencing statute. Code § 19.2-264.4.

Later, the trial court considered a probation officer's report and heard testimony from the officer relevant to punishment. The court then sentenced the defendant to death for the capital murder.

[1] The death sentence is before us for automatic review under Code § 17- 110.1(A), see Rule 5:22. As required by statute, we will consider not only the trial errors enumerated by the defendant but also whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. Code § 17-110.1(C).

There is no conflict about any relevant fact in the case. In early February 1993, defendant, who was age 20, a North Carolina resident, and on probation for a 1992 drug conviction, participated in the burglary of a residence in the Fayetteville, North Carolina area. During the course of that crime, defendant obtained a set of keys to a 1987 Volkswagen Jetta automobile parked at the residence, and stole the vehicle. Later that month, defendant drove the vehicle to Washington, D.C., intending to sell it or trade it for drugs. Defendant carried in the vehicle a Glock Model 17, nine millimeter, semi- automatic pistol loaded with hollow-point bullets. According to the testimony, the bullets were designed for police use, not target practice or hunting; this type of bullet is referred to as a "man-stopper."

During the late evening of February 23, defendant was riding as a passenger in the vehicle being driven by his uncle, 21-year-old Lewis J. Dukes, Jr., a resident of the District of Columbia. The pair was travelling

**383 en route from Washington to Richmond southbound on Interstate Route 95.

Around midnight, Trooper Cavazos was operating radar from his marked police vehicle parked in the highway medium monitoring southbound traffic. The Volkswagen driven by Dukes passed the trooper's position at a high rate of speed. The officer activated his vehicle's emergency lights and proceeded to chase the vehicle occupied by defendant. After travelling a brief distance, and passing other vehicles by driving on the right shoulder of the highway, Dukes brought the car to a stop on the Dale City exit ramp, in a dark, remote area.

The trooper pulled his patrol car to a stop behind the Volkswagen, which he approached on foot on the driver's side. Upon the officer's request, Dukes alighted and was standing toward the left rear of the Volkswagen when the trooper asked defendant to step out of the vehicle.

Defendant complied with the officer's request and alighted on the right side of the vehicle as the trooper was near the left side. As defendant left the vehicle he was carrying the fully loaded pistol. He then fired at least six bullets at the officer, two of which entered his body beside the right and left shoulder straps of the protective vest the trooper was wearing. The officer was immediately rendered unconscious and fell to the pavement, dying within minutes at the scene with his police weapon in its "snapped" holster.

Defendant, with Dukes as a passenger, then drove the Volkswagen from the scene and parked it on the lot of a nearby service station. Defendant returned to the scene of the crime on foot and retrieved Dukes' District of Columbia driver's license that had been dropped on the pavement. Defendant rejoined Dukes, and they were found by police shortly thereafter in the parking lot of a nearby motel.

[2] On appeal, defendant assigns 47 alleged errors committed by the trial court. The defendant has not briefed or argued ten of those assigned errors (Nos. 4, 5, 6, 7, 8, 17, 26, 31, 38, and 39); hence we will not consider them. Jenkins v. Commonwealth, 244 Va. 445, 451, 423 S.E.2d 360, 364 (1992), cert. denied, 507 U.S. 1036, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993). In addition, defendant effectively presents no argument in support of five of those alleged errors (Nos. 16, 34, 44, 45, and 46). Typical of the argument in support of those five is the following conclusional statement on brief in support of No. 45: "This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia." We have considered these so-called arguments and find no merit in any of the five.

The remaining assignments of error emphasized by defendant present questions dealing with defendant's detention before his arrest, his confession, requests for a scientific investigation and expert assistance in the fields of ballistics and pathology, the seating of one juror who was challenged for cause, and use during the trial's penalty phase of victim impact evidence.

First, defendant contends that he was detained for approximately two hours before he was arrested and that this constituted an illegal arrest without probable cause. Because the arrest was illegal, defendant argues, the trial court erred by admitting in evidence defendant's statements to police that were the product of the illegal arrest.

The facts relevant to this issue were presented both at a pretrial suppression hearing and during the trial. The evidence showed that Prince William County police officer James C. Virgil, Jr., was dispatched to the scene of the crime about 12:53 a.m. on February 24, and began searching the immediate area for possible suspects. Shortly, Virgil saw defendant and Dukes walking in the rear parking lot of the motel located about one-half mile from the scene. The men, who were walking close together toward Virgil's marked police car, "turned back around and started to walk away" from the car. Then the pair "started to split apart. One subject was going to the left and one going to the right." When the officer was 15-20 feet from them with the vehicle's headlights and spotlight operating, he stopped the vehicle

**384 and began to step from the car. At that point, the men "immediately" threw "both their hands up in the air" and one said "Don't shoot." Virgil then said, "Police. Don't move. Can I talk to you all?"

Virgil approached the men and said, "Is it okay if I pat you down for my safety?" Defendant said "go ahead." Virgil felt the outside of their clothing and seized nothing from either man. At the time Virgil noticed that defendant "was breathing heavily and was sweating profusely." Defendant was wearing a plaid shirt, blue jeans, and no jacket in 29-degree weather. The officer began asking "just basic casual talking questions." The men produced identification with defendant showing a North Carolina driver's license.

When the officer asked, "What are you all doing here?" defendant said they had been "dropped off" at the motel parking lot by a relative several hours earlier to await "two girls from Washington, D.C." While there, defendant said, "We heard the shots." Virgil asked, "What shots?" Without directly responding to that question, defendant stated that he ran "to where the shots came from" and saw a State Trooper on the ground who had been shot. Defendant said that he "ran over to the trooper and he rolled the trooper over to help him." Defendant stated that as other police officers arrived at the scene, he returned to the motel parking lot.

Virgil then asked defendant if the pair "would mind" remaining at the motel to await an investigator to interview them, inasmuch as they were the only persons who had heard the shots and defendant had been to the scene. Defendant agreed, stating "that's fine."

In a few minutes, Prince William County police officer Lyle Denny arrived to assist Virgil. Denny made "a pat down" of defendant and removed from defendant's left trouser pocket "a group of Volkswagen keys." After examining the keys, Denny returned the keys to the pocket.

Because of the cold weather and the fact that defendant was not wearing a jacket or sweater, Virgil asked the pair whether they would like to sit in his police car. Defendant replied, "I thought you'd never ask. Sure." The two men entered the back seat of the vehicle. Even though the pair could not open the rear doors from the inside, they did not ask to get out. They were not restrained with handcuffs or similar devices. A plastic barrier separating the front and rear parts of the vehicle was in the "down" position, enabling them to speak easily with Virgil when he was in the front seat.

A short while later, upon defendant's request, he was taken to the motel and permitted to make two telephone calls. After making the calls, defendant asked "if he could go get some food and something to drink up at" the service station. About the same time, Virgil learned from the police radio that county officers had located "a suspicious vehicle" at the service station, about 75 yards from the motel lot. Virgil responded to Weeks' request with, "Do you mind holding off right now? ... I can't let you do that right now, if that's okay with you." Defendant said, "Fine."

A few seconds later, Virgil learned from another radio transmission that the "suspicious" vehicle was a Volkswagen bearing North Carolina license plates. Recalling that defendant had Volkswagen keys in his pocket and carried a North Carolina operator's license, Denny asked defendant, who was inside the police vehicle, "where the keys that were in his pocket were." Defendant responded, "What keys?" The officer asked defendant to step out of the vehicle and "patted" defendant's pants pockets, finding no keys. Then the rear seat of the vehicle was lifted, and the keys were found directly under where defendant had been sitting. When the officer showed the keys to defendant, he said, "Those aren't my keys."

About 2:45 a.m., after defendant had been with Officer Virgil for about two hours, state police officers arrived to question defendant and Dukes. Near 3:00 a.m., state police Special Agent J.K. Rowland met defendant in the motel lobby. Rowland "explained to him that he was not under arrest" and asked defendant "if he would like to talk ... about what he had seen up on Interstate 95." Defendant, who Rowland testified was "free to leave at that time," conducted an interview

**385 with defendant in private in one of the motel rooms.

[3] We do not agree with defendant's contention that his two-hour detention while being questioned by Officers Virgil and Denny violated his Fourth Amendment rights under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its progeny. Terry is not implicated here because, as the trial court found from the undisputed facts, defendant consented to the detention and generally agreed to cooperate with the police. Just as a defendant may consent to a search, he may also consent to what would otherwise amount to a seizure of his person. Limonja v. Commonwealth, 8 Va.App. 532, 539-41, 383 S.E.2d 476, 480-82 (1989), cert. denied, 495 U.S. 905, 110 S.Ct. 1925, 109 L.Ed.2d 288 (1990).

At every step in the questioning during the whole two-hour period, the defendant readily agreed to the detention. He consented to the initial "pat down," acquiesced to questioning, accepted the invitation to enter the police car, agreed not to go to the service station for food and drink, acquiesced to a second and third "pat down" of his trouser pockets, and agreed to be interviewed alone in the motel room by Rowland. "The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation." Florida v. Bostick, 501 U.S. 429, 439, 111 S.Ct. 2382, 2389, 115 L.Ed.2d 389 (1991).

[4] Next, defendant contends that the trial court erred in denying his motion to suppress the confession made to Special Agent Rowland because the authorities failed to scrupulously honor his request to remain silent.

The facts relevant to this issue show that as Rowland questioned defendant in the motel room, Rowland became "more and more suspicious" of defendant. Even though defendant "was free to leave" at that point, Rowland advised defendant of his constitutional rights according to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as a precaution at 7:40 a.m. Defendant then exercised his right to remain silent and wrote, "Do not want to discuss case any further," on the "Advice of Rights" form that he signed. Rowland honored this request, and ceased questioning.

At 7:50 a.m., Rowland was advised by another investigator that Dukes had just stated that defendant shot the trooper. Rowland arrested defendant at 7:52 a.m.

Subsequently, defendant was taken before a magistrate and then to the Adult Detention Center in Manassas. Later that morning, classification officers in the jail routinely questioned defendant about his physical and mental state; no attempt was made to elicit information about the crime. During the interview, defendant indicated he was considering suicide because he had shot the trooper. Defendant also voluntarily wrote a letter to a jail official admitting the killing and expressing remorse. Defendant does not contest either of these admissions but attacks the constitutional validity of the following interview.

Near 6:00 p.m. on February 24, defendant was brought to the lounge of the local prosecutor's office where Rowland again interviewed him; additional information had been developed by the police during the day between the termination of the first interview and the beginning of this second interview. Rowland asked defendant, "Do you remember the rights I read to you earlier today?" to which defendant responded affirmatively. Rowland proceeded "to summarize the investigation through the course of the day's events to that point in time."

Among other things, Rowland told defendant that an eyewitness to the shooting had made a positive identification of him as the assailant. A witness actually had identified defendant as a person she saw at the scene after the homicide, but she had not witnessed the shooting. At the conclusion of Rowland's summary, he said to defendant, "This is your opportunity to provide your explanation as to what happened at the shooting scene." Defendant responded, "Yes, I was packing." The officer knew that "packing" meant "carrying a firearm."

The defendant then confessed to the trooper's murder. Defendant stated that when the trooper asked him to get out of the

**386 Volkswagen, he picked up the pistol and "thought about throwing it away." Instead, he saw the trooper put his hand down toward his service revolver. Defendant said he then "panicked" and shot the victim "several times rapidly." Defendant stated that he drove, with Dukes as a passenger, to the service station, placing the pistol under the front floor mat of the Volkswagen. This interview lasted about one hour during which defendant readily answered questions and did not invoke his right to remain silent or any other constitutional right.

In support of his attack on the validity of the confession, defendant notes that he made no request to speak with the police after he exercised his right to silence at 7:40 a.m. Instead, he points out, he was held in jail and transported to the prosecutor's office about ten hours later. He notes that at the time of the interview he was restrained in handcuffs and leg irons, being questioned by the same officer to whom he previously indicated a desire to remain silent. Defendant also points out that he was not "read his rights" again, merely "asked if he understood the rights read to him previously." Thus, defendant contends, the confession later introduced at trial violated his constitutional rights. We do not agree.

In Miranda, the Supreme Court stated that, once the required warnings have been given a person before a custodial interrogation, the interrogation must cease if the individual, "at any time prior to or during questioning," expresses a desire to remain silent. 384 U.S. at 474, 86 S.Ct. at 1627. At this point, the Court said, the individual has shown an intention "to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." Id.

Subsequently, in discussing the scope of the foregoing Miranda passage, the Supreme Court said: "Clearly, therefore, neither this passage nor any other passage in the Miranda opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." Michigan v. Mosley, 423 U.S. 96, 102-03, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). The Court held "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.' " Id. at 104, 96 S.Ct. at 326. Accord Lamb v. Commonwealth, 217 Va. 307, 312, 227 S.E.2d 737, 741 (1976).

We will assume Rowland's preliminary comments at the second interview giving defendant the "opportunity" to explain his part in the crime amounted to an "interrogation." The question thus becomes whether defendant's prior election to remain silent was "scrupulously honored." We hold that it was.

[5] Suggesting a case-by-case approach to determine that continued questioning was appropriate after an initial refusal to answer questions, the Mosley court mentioned five factors that related to the evidence in that case. First, whether defendant "was carefully advised" before the initial interrogation "that he was under no obligation to answer any questions and could remain silent if he wished." Id. at 104, 96 S.Ct. at 327. Second, whether there was an immediate cessation of the initial interrogation, and no attempt to persuade defendant to reconsider his position. Id. Third, whether the police resumed questioning "only after the passage of a significant period of time." Id. at 106, 96 S.Ct. at 327. Fourth, whether Miranda warnings preceded the second questioning. Id. at 104, 96 S.Ct. at 326-27. Fifth, whether the second interrogation was limited to a crime that had not been the subject of the earlier interrogation. Id.

Clearly, when those factors are applied to the present case, no violation of defendant's Fifth Amendment rights occurred. Defendant was carefully advised before the initial interview of his right to remain silent, and there was immediate cessation of that interview when defendant exercised his right to silence. Moreover, ten hours, "a significant period of time," had passed between the first and second interviews, during which time defendant had confessed to the classification officers.

**387 Furthermore, even though a fresh set of Miranda warnings was not given before the second interview as was the case in Mosley, defendant responded affirmatively when asked whether he remembered the "rights" that were read to him "earlier today." He then readily and without hesitation freely discussed the matter with the investigator and did not revoke his valid waiver. Under these circumstances, the initial waiver is presumed to continue and the failure to offer defendant a new set of warnings does not render the second interview unconstitutional. See North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979); Washington v. Commonwealth, 228 Va. 535, 548, 323 S.E.2d 577, 586 (1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

[6] Finally, the mere fact that the second interview involved some of the same subject matter discussed during the initial interview does not render the confession constitutionally invalid. United States v. House, 939 F.2d 659, 662 (8th Cir.1991). Defendant was advised of the new facts that had been developed by the investigators, and there was no effort to persuade defendant against his will after he initially invoked his right to silence by repeating questions about the same subject matter covered earlier. Hence, there was no violation of Miranda under that prong of Mosley as a result of the reinterrogation. See Jackson v. Wyrick, 730 F.2d 1177, 1180 (8th Cir.), cert. denied, 469 U.S. 849, 105 S.Ct. 167, 83 L.Ed.2d 102 (1984).

Next, the defendant complains about the denial of two pretrial motions, which defendant wished to be considered by the court ex parte out of the prosecutor's presence.

[7] First, defendant filed a paper entitled "Ex Parte Motion for Disclosure of Records Maintained by the Central Criminal Records Exchange." In the motion, defendant sought copies of any criminal records pertaining to a number of individuals, including himself and Dukes, and certain North Carolina residents likely to be called as witnesses by the prosecutor. Over defendant's objection, the trial court permitted the prosecutor to attend the hearing on the motion and to argue against granting it. Following the hearing, the court denied the motion.

Code § 19.2-389 is codified among the statutes dealing with the duties and authority of the Exchange (CCRE), a separate division within the Department of State Police and, with a few exceptions, "the sole criminal record-keeping agency of the Commonwealth." Code § 19.2-387(A). Section 19.2-389 provides, in part, that upon "an ex parte motion of a defendant in a felony case and upon the showing that the records requested may be relevant to such case, the court shall enter an order" requiring the CCRE to furnish the defendant copies of any records of persons designated in the order on whom a report has been made to the CCRE. The statute is silent about the nature of any hearing on such motion.

We will assume, but not decide, that the statute is applicable to discovery in felony cases, that the defendant is entitled to be heard ex parte, and that the trial court erred in denying his motion under the statute. Nevertheless, we hold that the court did not commit reversible error because nothing in the record suggests that the trial court's rulings prejudiced defendant's right to fairly defend himself. See George v. Commonwealth, 242 Va. 264, 281, 411 S.E.2d 12, 23 (1991), cert. denied, 503 U.S. 973, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992).

Many of the persons named in the motion, including Dukes, did not testify at trial. In addition, the trial court had already ordered the prosecutor to furnish defendant before trial criminal history information concerning any witness to be called by the prosecutor "at any hearing in or trial of this case." Therefore, the "ex parte motion" was redundant.

[8] Second, defendant filed a paper labelled "Motion For Scientific Investigation, Ex Parte." Relying upon Code § 2.1-434.11, defendant moved the court to order a scientific investigation into certain factors surrounding the victim's death, including whether death was instantaneous as a result of the fatal wounds.

Code § 2.1-434.11 is codified among the statutes establishing a Division of Forensic

**388 Science within the State Department of General Services. That statute authorizes an attorney for an accused to request a scientific investigation, if the attorney believes in good faith that such investigation may be relevant to the criminal charge. The statute provides that the "motion shall be heard ex parte" and, if satisfied as to the correctness of the attorney's representation, the court shall order the investigation to be performed by the Division.

We do not reach the merits of the defendant's complaint because the issue has been procedurally defaulted. The trial court never denied the motion. At the hearing on the motion, with the prosecutor present, the trial court said that it would entertain the motion later upon defendant's showing that he had unsuccessfully sought the results of such testing that probably already had been conducted by the Division. Defense counsel did not object to this ruling; instead, he withdrew the motion as being not "timely." Because defendant acquiesced in the trial court's ruling, he may not challenge it on appeal. Rule 5:25.

Associated with defendant's claim of error relating to the request for a scientific investigation is the complaint that the trial court erred by denying his request to be heard ex parte on his motion for expert assistance in the fields of pathology and ballistics, and for denial of the request for appointment of such experts. Defendant asked that his motion for funding for expert assistance "be treated under the same procedure as required by Title 18 USC 3006A(e) in Federal Court." There is no merit to this contention.

[9] We already have decided that a defendant charged with capital murder is not entitled to an ex parte hearing on his motion for expert assistance. Ramdass v. Commonwealth, 246 Va. 413, 422, 437 S.E.2d 566, 571 (1993), rev'd on other grounds sub nom. Ramdass v. Virginia, --- U.S. ---, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). In addition, we specifically have refused to apply the federal statute to state capital murder prosecutions. Id.

[10] Before moving to the last two issues emphasized by defendant, we will comment on other matters raised before trial that are the subject of assignments of error. These issues warrant only a brief discussion because none of them has merit. Defendant raises related arguments regarding the trial court's partial denial of motions for bills of particulars. No challenge was made to the sufficiency of the indictment; thus, a bill of particulars was not required. Strickler v. Commonwealth, 241 Va. 482, 490, 404 S.E.2d 227, 232- 33, cert. denied, 503 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991). Defendant has procedurally defaulted a contention that we repeatedly have rejected, that is, that Virginia's capital murder and death penalty statutes are constitutionally infirm. In support of that contention, defendant impermissibly incorporates by reference a memorandum filed on the subject in the trial court. Jenkins, 244 Va. at 461, 423 S.E.2d at 370 (defendant has obligation to state clearly to appellate court grounds for assertion trial court's ruling erroneous; cross-reference to arguments presented at trial insufficient).

[11][12][13] Next, defendant raises several issues dealing with juror voir dire. He contends the trial court erred in denying individual voir dire and in refusing to allow a number of questions that he submitted to be asked of the prospective jurors. A defendant has no right to individual voir dire. Stewart v. Commonwealth, 245 Va. 222, 229, 427 S.E.2d 394, 399, cert. denied, 510 U.S. 848, 114 S.Ct. 143, 126 L.Ed.2d 105 (1993). Also, the trial court did not abuse its discretion in disallowing the questions because they were either improper, vague, argumentative, or nonspecific. Buchanan v. Commonwealth, 238 Va. 389, 402, 384 S.E.2d 757, 765 (1989), cert. denied, 493 U.S. 1063, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990). And, contrary to defendant's argument, the trial court did not abuse its discretion, in this case of a white victim and a black accused, in the manner which it questioned the prospective jurors on the subject of potential racial bias. See Turner v. Murray, 476 U.S. 28, 37, 106 S.Ct. 1683, 1688-89, 90 L.Ed.2d 27 (1986) (trial judge retains discretion as to form and number of questions on issue of racial bias when capital murder defendant accused of interracial crime).

**389 Also, defendant argues the trial court erred in denying his challenge for cause of juror Frederick Pama. Responding to the question whether he knew personally anyone who was the victim of a violent crime, Pama said, "About three years ago ... my wife's first cousin, who was very close to us, got killed. He was a police officer, from a drug shootout, and that affects me."

Pama initially had answered many questions by the trial court and counsel which reflected his ability to serve as an impartial juror. After he answered the foregoing question, he responded to questions by the prosecutor and said he could set aside any opinion he had formed about the case and could render a decision based solely on the law, and evidence produced at trial. Finally, when asked again by the prosecutor whether he "could be fair and impartial and set aside anything" he may have heard in the past and whether he could "be fair in this matter, both to the Commonwealth and to the accused," Pama answered, "I think so."

When denying defendant's motion to strike Pama, the trial court stated that "the proposed juror did not say that it would have an impact. He said, the way I understood his answer, he was not certain if it would have an impact, but at this time it would not."

[14] Upon appellate review, we must give deference to the trial court's decision whether to exclude or retain a prospective juror because the trial court "sees and hears the juror;" accordingly, the trial court's decision will be disturbed only upon a showing of manifest error. Eaton v. Commonwealth, 240 Va. 236, 246, 397 S.E.2d 385, 391 (1990), cert. denied, 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991) (quoting Wainwright v. Witt, 469 U.S. 412, 426, 105 S.Ct. 844, 853, 83 L.Ed.2d 841 (1985)). Accord George, 242 Va. at 276, 411 S.E.2d at 19 (juror not automatically disqualified on account of fact son had served as pallbearer at victim's funeral).

[15] We find no manifest error in the court's refusal to dismiss Pama for cause. From a review of Pama's entire voir dire, we conclude that the trial court was justified in finding that Pama could be impartial during the trial. Our duty to defer to the trial judge on this subject is illustrated by Pama's final answer, "I think so," which the trial judge, not this Court, heard. The juror's emphasis on "so" in that answer conveys an entirely different meaning than if the emphasis had been on "think." On appeal, we must presume he emphasized "so."

Finally, defendant contends the trial court erred in admitting "victim impact testimony" during the penalty phase of the trial. The victim's widow, as well as state troopers who worked with the deceased, testified about the profound effect the killing had on his surviving family and those with whom he worked.

[16] On appeal, defendant mounts a two-prong argument: so-called "victim impact evidence" is not relevant in Virginia to the jury's sentencing decision in a capital case, and, even if it is, the evidence should be limited to the effect upon family members only and not to the effect upon nonfamily members closely associated with the victim. We will not address the latter contention because, in the trial court, the defendant did not distinguish between testimony by family members and testimony from other sources. Therefore, the defendant may not challenge on appeal the admissibility of the troopers' testimony. Rule 5:25.

[17] Addressing the former contention, we hold that victim impact testimony is relevant to punishment in a capital murder prosecution in Virginia, and that the trial court did not err in admitting the testimony in this case. In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the Supreme Court authorized the use of such testimony. The Court said: "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." Id. at 827, 111 S.Ct. at 2609.

Defendant's reliance on Dingus v. Commonwealth, 153 Va. 846, 149 S.E. 414 (1929), is misplaced. There, in a unitary criminal trial, this Court held improper a prosecutor's argument alluding to the impact of the murder on the victim's widow, because it "in no way assists in determining either the guilt or

**390 the innocence of the accused." 153 Va. at 850, 149 S.E. at 415. In contrast, under Virginia's modern, bifurcated capital procedure,. victim impact evidence is probative, for example, of the depravity of mind component of the vileness predicate, which the jury in this case found as a basis for imposing the death penalty. As the Supreme Court said in Payne, "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." 501 U.S. at 825, 111 S.Ct. at 2608.

In conclusion, defendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. We have considered all the arguments in support of those issues and conclude that none has any merit. Only two of those issues warrant further discussion. First, defendant claims the trial court erred in permitting Special Agent Rowland to testify that Dukes had stated to another investigator "that Lonnie Weeks did, in fact, shoot the trooper." At trial, defendant objected to the statement specifically cn the ground that it was inadmissible hearsay and generally on constitutional grounds.

[18][19] The hearsay rule does not operate to exclude evidence of a statement offered for the mere purpose of explaining the conduct of the person to whom it was made; this is especially true when the evidence is not offered for the purpose of establishing guilt or innocence of the accused "but for the purpose of showing the reason for the police officers' action in arresting him." Upchurch v. Commonwealth, 220 Va. 408, 410, 258 S.E.2d 506, 508 (1979). See Manetta v. Commonwealth, 231 Va. 123, 127-28, 340 S.E.2d 828, 830 (1986). As the prosecutor argued, and the trial court implicitly found, this statement was offered to explain Rowland's action in arresting defendant at 7:52 a.m. after considering defendant not in custody 12 minutes earlier, and not to prove that defendant had in fact shot the trooper. Thus, the trial court did not err in admitting the statement.

[20][21][22] Second, defendant contends the trial court erred in denying his motion to strike the Commonwealth's evidence on the offense of capital murder made on the ground that the evidence was insufficient to prove the element of premeditation. The question whether a defendant is guilty of a premeditated killing of the victim is usually a jury question. The intention to kill need not exist for any specified length of time prior to the actual killing; the design to kill may be formed only a moment before the fatal act is committed provided the accused had time to think and did intend to kill. Clozza v. Commonwealth, 228 Va. 124, 134, 321 S.E.2d 273, 279 (1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985). In deciding the question, the jury may consider, among other things, the brutality of the attack and whether more than one shot was fired. Id.

[23] In the present case, the jury's finding on this element was fully supported by the evidence, and the trial court did not err in denying the motion to strike. On probation, riding in a stolen vehicle, and possessing a weapon that the evidence showed had been used in a previous North Carolina murder, defendant shot the trooper at virtually point-blank range at least six times to avoid arrest. Several of the bullet wounds, according to the evidence, probably were the result of ricochet, indicating that the trooper may have been fired upon while lying on the pavement. These and other factors surrounding the killing amply proved premeditation.

Lastly, defendant contends that the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor, and is excessive or disproportionate to the penalty imposed in similar cases. We do not agree.

As we have said, the jury fixed defendant's sentence at death on the capital murder conviction upon the "vileness" predicate. Defendant points to no meaningful basis for concluding that the determination was made arbitrarily. He merely says the "verdict is irreparably tainted by the error-filled process that produced it" and he is "not a person who deserves to die." On the contrary, the record amply supports the conclusion that

**391 the sentence was appropriate under the circumstances.

[24] On the question of "vileness," the jury found that defendant's conduct in committing the offense involved "depravity of mind and/or aggravated battery." Both of these components of the vileness predicate were established. For example, defendant, in an attempt to avoid arrest, shot the trooper at least six times from close range with a high-powered revolver, two of the shots being independently fatal, under the evidence. The officer posed no threat to defendant in connection with this routine traffic stop; the trooper died with his service revolver still enclosed in its holster. Then, the defendant left and returned to the scene, falsely claiming that he attempted to render assistance to the victim when his real purpose was to retrieve incriminating evidence.

[25] On the question of excessiveness and disproportionality, we determine whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant. Code § 17-110.1(C)(2); Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). To assist in this determination, we consider records of all capital murder cases reviewed by this Court, including cases where life imprisonment has been imposed. Code § 17- 110.1(E).

In Smith v. Commonwealth, 239 Va. 243, 271, 389 S.E.2d 871, 886, cert. denied, 498 U.S. 881, 111 S.Ct. 221, 112 L.Ed.2d 177 (1990), referring to Delong v. Commonwealth, 234 Va. 357, 372, 362 S.E.2d 669, 677 (1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 263 (1988), we compiled capital cases involving murders of police officers. See Eaton, supra. And, today in Cardwell v. Commonwealth, 248 Va. 501, 450 S.E.2d 146 (1994), we referred to those cases where, as here, the death sentences were based upon the vileness factor. From a consideration of all these cases, we conclude that the death sentence in this case is not excessive or disproportionate to the punishment generally imposed by juries in the Commonwealth for similar conduct.

Consequently, we hold the trial court committed no reversible error, and we have independently determined from a review of the entire record that the sentence of death was properly assessed. Thus, the judgment of the trial court will be

Affirmed.

END OF DOCUMENT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 4, 1999

No. 98-21
CA-96-829-2

LONNIE WEEKS, JR.

Petitioner - Appellant

v.

RONALD J. ANGELONE, Director of the Virginia Department of Corrections

Respondent - Appellee

On Petition for Rehearing and Rehearing En Banc

Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

denied

JURY INSTRUCTION C1

Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the Defendant to life in prison.

withdrawn

INSTRUCTION NO. 1

You are the judges of the facts, the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

INSTRUCTION NO. 2

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than $100,000.00. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live and a fine of a specific amount, but not more than $100,000.00.

If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live and a fine of a specific amount, but not more than $100,000.00.

INSTRUCTION 3

"Aggravated battery" means a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

JURY INSTRUCTION B1

EVIDENCE IN MITIGATION

Mitigation evidence is not evidence offered as an excuse for the crime of which you have found defendant guilty. Rather, it is any evidence which in fairness may serve as a basis for a sentence less than death. The law requires your consideration of more than the bare facts of the crime.

Mitigating circumstances may include, but not be limited to, any facts relating to defendant's age, character, education, environment, life and background, or any aspect of the crime itself which might be considered extenuating or tend to reduce his moral culpability or make him less deserving of the extreme punishment of death.

You must consider a mitigating circumstance if you find there is evidence to support it. The weight which you accord a particular mitigating circumstance is a matter of your judgment.

① Does the sentence of life imprisonment in the State of Virginia have the possibility of parole and if so under what conditions must be met to receive parole

You shall impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

If we believe that Jonnie Weeks, Jr is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or life sentence. What is the Rule Please clarify.

- See second paragraph of Instruction #2 (Beginning with "If you find from .....

OPPOSITION BRIEF

NO. 99-5746

A. 99A151

**IN THE
SUPREME COURT OF THE
UNITED STATES**

LONNIE WEEKS, JR.,

Petitioner,

v.

**RONALD ANGELONE, Director,
Virginia Department of Corrections,**

Respondent.

**On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The
Fourth Circuit And On Application For Stay Of Execution**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND TO APPLICATION FOR STAY

MARK L. EARLEY
Attorney General of Virginia

***ROBERT H. ANDERSON, III**
Assistant Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

***Counsel of Record**

RECEIVED
AUG 27 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

Where It Is Undisputed That The Petitioner Murdered A Virginia State Trooper By Shooting Him Six Times During A Routine Traffic Stop:

I. **Is there any "compelling" reason to review the Fourth Circuit's application of this Court's recent decision in Buchanan v. Angelone, 118 S.Ct. 757 (1998), to the facts of petitioner's case, which are substantially indistinguishable from those in Buchanan?**

II. **Is petitioner's "experts" claim, for which he clearly has failed to make any plausible showing of "necessity," barred by the "new rule" doctrine?**

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

REASONS FOR DENYING THE WRIT AND A STAY 4

I. Based On This Court's Decision In Buchanan v. Angelone, 118 S.Ct. 757 (1998), The Fourth Circuit Correctly Upheld The Supreme Court Of Virginia's Ruling On Direct Appeal That The Jury Properly Considered The Mitigating Evidence Before Imposing A Death Sentence. 4

II. Weeks' Claim That He Was Constitutionally Entitled To The Services Of Certain Forensic Experts, Which Is Unaccompanied By Any Supporting Factual Argument, Is Barred By The New Rule Doctrine And Does Not Present A Substantial Federal Constitutional Issue. 12

CONCLUSION 17

CERTIFICATE OF COUNSEL 18

TABLE OF AUTHORITIES

Page

Cases

Ake v. Oklahoma, 470 U.S. 68 (1985) 12, 13, 14

Bollenbach v. United States, 302 U.S. 607 (1946) 11

Brecht v. Abrahamson, 507 U.S. 619 (1993) 9

Buchanan v. Angelone, 118 S.Ct. 757 (1998) ..... passim

Caldwell v. Mississippi, 472 U.S. 320 (1985) 12, 13, 14

Graham v. Collins, 506 U.S. 461 (1993) 11

Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157, cert. denied, 484 U.S. 873 (1987) 15

Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920, cert. denied, 117 S.Ct. 1092 (1997) 14

Leonardo v. People, 728 P.2d 1242 (Colo. 1986) 10

Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987) (en banc) 14

McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997) (en banc), cert. denied, 118 S.Ct. 1575 (1998) 10, 11

McKinley v. Smith, 838 F.2d 1524 (11th Cir. 1988) 14

Potter v. United States, 534 A.2d 943 (D.C. 1987) 10

Ross v. Moffitt, 417 U.S. 600 (1974) 15

Sawyer v. Smith, 497 U.S. 227 (1990) 14

Teague v. Lane, 489 U.S. 288 (1989) ..... passim

United States v. Barragan-Devis, 133 F.3d 1287 (9th Cir. 1988) 11

United States v. Zimmerman, 943 F.2d 1204 (10th Cir. 1991) 9

Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999) ..... passim

Weeks v. Angelone, 4 F.Supp.2d 497 (E.D. Va. 1998) 2, 17

Weeks v. Commonwealth, 248 Va. 460, 450 S.E.2d 379 (1994) 1

Weeks v. Virginia, 516 U.S. 829 (1995) 1

Other Authorities

21 U.S.C. § 848(q)(9) 17

28 U.S.C. § 2254(e) 2

Rule 5:7A(a), Rules of the Supreme Court of Virginia 1

Section 8.01-654.1, Code of Virginia 1

U.S.S.Ct. Rule 10 5

STATEMENT OF THE CASE

In a jury trial conducted in the Circuit Court of Prince William County, Virginia on October 18-22, 1993, Lonnie Weeks, Jr. was convicted of the capital murder of Virginia State Trooper Jose Cavazos. In the two-day penalty phase of the trial, after finding that the Commonwealth had proved the statutory "vileness" aggravating factor, see Va. Code § 19.2-264.4, the jury imposed a death sentence on October 22, 1993. On January 14, 1994, the trial court sentenced Weeks to death on the capital murder conviction.[1]

On direct appeal, the Supreme Court of Virginia affirmed Weeks' capital murder conviction and death sentence. Weeks v. Commonwealth, 248 Va. 460, 450 S.E.2d 379 (1994). Then, on January 13, 1995, the state court denied Weeks' petition for rehearing. This Court denied certiorari review on October 2, 1995. Weeks v. Virginia, 516 U.S. 829 (1995).

On December 4, 1995, Weeks filed his state habeas corpus petition in the Supreme Court of Virginia. On January 11, 1996, the Director filed a motion to dismiss the petition as jurisdictionally barred, based upon its untimeliness under Virginia Code § 8.01-654.1 and Rule 5:7A(a) of the Rules of the Supreme Court of Virginia. On March 15, 1996, the Virginia Supreme Court dismissed the petition as jurisdictionally barred. Then, on June 7, 1996, the Supreme Court denied Weeks' petition for rehearing.

Next, Weeks filed a lengthy habeas corpus petition in the United States District Court for the Eastern District of Virginia on February 7, 1997. After extensive briefing and oral argument, the district court dismissed the petition on April 1, 1998. Weeks v. Angelone, 4 F. Supp.2d 497 (E.D. Va. 1998). On June 19, 1998, the district court denied Weeks' motion to alter or amend the judgment.

On appeal, the United States Court of Appeals for the Fourth Circuit unanimously upheld the district court's denial of habeas relief on May 10, 1999. Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999). On June 4, 1999, the Fourth Circuit, without dissent, denied Weeks' petition for a rehearing. On June 14, 1999, the Court of Appeals issued its mandate. The Circuit Court of Prince William County then set Weeks' execution for September 1, 1999. Finally, on August 3, 1999, the Fourth Circuit denied Weeks' motion to recall its mandate and stay his execution.

STATEMENT OF FACTS

Weeks concedes that he shot Virginia State Trooper Jose Cavazos six times during a traffic stop in Prince William County, Virginia, on February 24, 1993. (Pet. at 3). In its opinion the Fourth Circuit reprinted verbatim the facts in this case, as found by the Virginia Supreme Court on direct appeal. Weeks v. Angelone, 176 F.3d at 254-256. These facts are binding on federal habeas corpus pursuant to 28 U.S.C. § 2254(e):

> In early February 1993, defendant, who was age 20, a North Carolina resident, and on probation for a 1992 drug conviction, participated in the burglary of a residence in the Fayetteville, North Carolina area. During the course of that crime, defendant obtained a set of keys to a 1987 Volkswagen Jetta automobile parked at the residence, and stole the vehicle. Later that month, defendant drove the vehicle to Washington, D.C., intending to sell it or trade it for drugs. Defendant carried in the vehicle a Glock Model 17, nine millimeter, semi-automatic pistol loaded with hollow-point bullets. According to the testimony, the bullets were designed for police use, not target practice or hunting; this type of bullet is referred to as a "man-stopper."
>
> During the late evening of February 23, defendant was riding as a passenger in the vehicle being driven by his uncle, 21-year-old Lewis J.

[1] In addition, Weeks pled guilty to use of a firearm in the commission of the capital murder and a related grand larceny charge and was sentenced to respective prison terms of three years and ten years.

Dukes, Jr., a resident of the District of Columbia. The pair was travelling en route from Washington to Richmond southbound on Interstate Route 95.

Around midnight, Trooper Cavazos was operating radar from his marked police vehicle parked in the highway medium monitoring southbound traffic. The Volkswagen driven by Dukes passed the trooper's position at a high rate of speed. The officer activated his vehicle's emergency lights and proceeded to chase the vehicle occupied by defendant. After travelling a brief distance, and passing other vehicles by driving on the right shoulder of the highway, Dukes brought the car to a stop on the Dale City exit ramp, in a dark, remote area.

The trooper pulled his patrol car to a stop behind the Volkswagen, which he approached on foot on the driver's side. Upon the officer's request, Dukes alighted and was standing toward the left rear of the Volkswagen when the trooper asked defendant to step out of the vehicle.

Defendant complied with the officer's request and alighted on the right side of the vehicle as the trooper was near the left side. As defendant left the vehicle he was carrying the fully loaded pistol. He then fired at least six bullets at the officer, two of which entered his body beside the right and left shoulder straps of the protective vest the trooper was wearing. The officer was immediately rendered unconscious and fell to the pavement, dying within minutes at the scene with his police weapon in its "snapped" holster.

Defendant, with Dukes as a passenger, then drove the Volkswagen from the scene and parked it on the lot of a nearby service station. Defendant returned to the scene of the crime on foot and retrieved Dukes' District of Columbia driver's license that had been dropped on the pavement. Defendant rejoined Dukes, and they [walked to] the parking lot of a nearby motel.

* * *

The defendant [subsequently] confessed to the trooper's murder. Defendant stated that when the trooper asked him to get out of the Volkswagen, he picked up the pistol and "thought about throwing it away." Instead, he saw the trooper put his hand down toward his service revolver. Defendant said he then "panicked" and shot the victim "several times rapidly." Defendant stated that he drove, with Dukes as a passenger, to the service station, placing the pistol under the front floor mat of the Volkswagen. This interview lasted about one hour during

which defendant readily answered questions and did not invoke his right to remain silent or any other constitutional right.

REASONS FOR DENYING THE WRIT AND A STAY

I. Based On This Court's Decision In Buchanan v. Angelone, 118 S.Ct. 757 (1998), The Fourth Circuit Correctly Upheld The Supreme Court Of Virginia's Ruling On Direct Appeal That The Jury Properly Considered The Mitigating Evidence Before Imposing A Death Sentence.

Weeks submits that this Court should review his claim challenging the trial court's reply to a question posed by the jury during its penalty phase deliberations because, supposedly, lower courts need guidance concerning how to answer jury questions exhibiting confusion over "technically flawless" instructions. (Pet. at 14). This case, however, is not an appropriate vehicle to address such an issue (assuming, of course, that this Court even would attempt to adopt some standard governing a trial court's response to a jury's question about a facially correct instruction, given the myriad of circumstances actuating such inquiry). Specifically, this Court's recent decision in Buchanan v. Angelone, which expressly confirmed the constitutionality of a jury instruction substantially identical to that in Weeks' case, renders Weeks' claim frivolous.

The Fourth Circuit's rejection of Weeks' fact-specific application of Buchanan plainly was correct and does not warrant this Court's review. 176 F.3d at 260-261.[2] And,

[2] The Court of Appeals rejected Weeks' claim both under § 2254(d) and under a de novo standard of review. See Weeks, 176 F.3d at 259-261 and n.5. The Fourth Circuit did so after rejecting the Director's argument that Weeks had procedurally defaulted this claim. 176 F.3d at 259. The Director continues to assert that the claim is procedurally barred because it was not raised with sufficient specificity in state court. (See Director's CA4 Br. at 8-11).

phase (including the parties' express reference to mitigating evidence in their opening statements and closing arguments, the defendant's presentation of mitigating witnesses over a period of two days, and the statement in the verdict form that the jury had considered the evidence in mitigation) showed that there was no reasonable likelihood that the instructions had precluded the jury's consideration of the defendant's mitigating evidence. Id. at 759-760, 762-763.

In addition, this Court rejected Buchanan's claim that the jury instructions had not made clear that the jury could impose a life sentence even if it found one or both of the statutory aggravating predicates. The Court concluded that any such "interpretation is at odds with the ordinary meaning of the instruction's language and structure." 118 S.Ct. at 762 n.4.

Apart from the identity of the instructions in Buchanan and this case, the additional factors relied upon by the Court in Buchanan exist here as well (with one exception that militates against Weeks' argument). In their opening statements, both the prosecution and the defense alluded to the aggravating and mitigating evidence that the jury would hear during the sentencing phase. (Oct. 21, 1993, Tr. 10-15). Thereafter, the defense presented ten witnesses, including Weeks himself, who testified at length about his background and the circumstances of Trooper Cavazos' death. Much as in Buchanan, the defense did not object to Instruction No. 2. (Oct. 21, 1993, Tr. 178-179). In sharp contrast to Buchanan, though, the trial court did instruct Weeks' jury on the concept of mitigation and specifically said that it "must consider a mitigating circumstance if you find there is evidence to support it." (App. 260, emphasis added). Then, during closing argument counsel for both parties discussed the mitigating evidence in the case and the fact that the

death penalty was not mandatory; defense counsel specifically stated that the jury "could still find that he meets both of these [aggravating predicates], and not sentence him to death." (Oct. 22, 1993, Tr. 18-19, 43-44, 46, 56-57). And, as in Buchanan, the jury's penalty-stage verdict specifically recited that the jury, "having considered the evidence in mitigation of the offense, unanimously fix[ed] his punishment at death." (App. 258). At the conclusion of the penalty phase, each member of the jury was polled and assented to the verdict. (App. 1346).

Thus, the only significant difference between Buchanan and the case at bar is that Weeks' jury was specifically instructed about the meaning of mitigating evidence and its obligation to consider it. Accordingly, Instruction No. 2 must be deemed sufficient to have informed the jury that it had to consider all mitigating evidence and that a death sentence was not automatic once the jury found at least one aggravating factor. It would be nonsensical to conclude that the trial judge's referral of the jury to a specific part of an instruction that this Court found constitutional in Buchanan somehow rendered the instruction unconstitutional.

The cases that Weeks cites as proof of some supposed "split" in the federal and state courts, as to what kind of information a trial court must provide to a jury that has been properly instructed but requests additional guidance, fall woefully short of justifying certiorari review in this case. Leaving aside the overriding fact that none of these cases involved jury instructions that so recently had received this Court's imprimatur (as in Buchanan), without exception the cases that Weeks relies upon are readily distinguishable from his case.

First, Weeks sets up a false distinction between the Fourth Circuit's opinion and caselaw in other circuits by characterizing the Fourth Circuit's ruling as establishing a per se rule. (Pet. at 14-15). This is clearly wrong; the Fourth Circuit merely addressed the propriety of the trial court's response under the record in this case. 176 F.3d at 261-262. The Court of Appeals did not purport to hold that a trial judge always acts properly in referring the jury to the original instructions. Moreover, the Fourth Circuit did not hold that when a jury seeks guidance regarding a facially valid instruction, "the appropriate response is simply to refer the jurors back to that instruction." (Pet. at 14). The Court of Appeals hardly could have done so, considering that the trial court in this case focused the jury's attention upon the specific part of Instruction No. 2 that answered the jury's question.

With one exception, moreover, the cases cited by Weeks are direct appeals. (Pet. at 14-19). Thus, such fundamental principles as finality and comity that inform Teague and, more generally, federal habeas review of state court judgments are simply absent from these cases. See Teague, 489 U.S. at 307-310. The very fact that so many of the cases that Weeks cites considered whether the trial court had "abused its discretion" or had committed "plain error" demonstrates the inapplicability of these decisions to Weeks' federal collateral case. Of course, Weeks is entitled to federal habeas relief only if the trial court committed constitutional error that was not harmless under the test in Brecht v. Abrahamson, 507 U.S. 619 (1993) (federal habeas petitioner must demonstrate that trial court error had substantial or injurious effect on verdict).[3]

The sole habeas case Weeks cites, McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997) (en banc), cert. denied, 118 S.Ct. 1575 (1998), is an exceedingly slender reed upon which to seek certiorari review. In McDowell, during its penalty phase deliberations the jury sent a note to the trial judge, reciting that it had voted for a death sentence by an eleven to one margin and that the eleven jurors favoring the death penalty did not regard the circumstances deemed by the remaining juror to be mitigation "as being either testimony or evidence that should be considered." 130 F.3d at 835 (emphasis added). The Ninth Circuit relied upon this language to conclude that the eleven jurors had "erroneously believed" that they could not consider substantial parts of the defendant's evidence as mitigation. 130 F.3d at 887 (emphasis added). Consequently, the Ninth Circuit held that the trial judge had been required to do something more than merely refer the jury to the general instructions on mitigation.

As the Ninth Circuit later made clear, however, McDowell hinged on the fact that the jury's question reflected, not mere confusion, but an affirmative misunderstanding of

---

the trial court's reply to the jury's question was error, the Tenth Circuit emphasized that the government's argument had contributed to the jury's confusion and the original jury instructions had not answered the questions posed or resolved the jury's confusion. 943 F.2d at 1213. Neither of these circumstances was present in the case at bar, where the prosecution's closing argument correctly recited the relationship between the aggravating and mitigating evidence in the case and Instruction No. 2 correctly explicated the jury's sentencing duties. Similarly, in Potter v. United States, 534 A.2d 943 (D.C. 1987), the court acknowledged that a trial judge is not required to respond to every jury inquiry but that, "where a jury shows confusion about a central aspect of applicable law, and the general instruction did not provide the legal information needed, reversible error occurs when the court does not respond to the jury's note." 534 A.2d at 946. Inasmuch as Buchanan demonstrates that the jury charge in Weeks' case did "provide the legal information needed," Potter actually buttresses the trial court's reply to Weeks' jury. See also Leonardo v. People, 728 P.2d 1242, 1255 (Colo. 1986) (trial court may refer jury

the jury charge. United States v. Barragan-Devis, 133 F.3d 1287 (9th Cir. 1988). In similarly sharp contrast to McDowell, Weeks' jury merely inquired about its sentencing options. On its face, the question did not indicate that the jury had found an aggravating circumstance, much less that any member of the jury erroneously believed that such a finding obligated the jury to impose a death sentence. In fact, the jury's question concluded: "What is the rule? Please clarify." (App. 256). Indeed, Weeks admits as much, referring several times to the jury's "clear lack of understanding" or "confusion" about its sentencing options, rather than any affirmative misunderstanding. (Pet. at 6, 7).[4]

Finally, Weeks' own petition makes clear that the present claim is barred under Teague. Accepting as correct Weeks' premise that the circuits are in conflict as to the propriety of the trial court's response in this case, it necessarily follows that a reasonable jurist could have rejected Weeks' claim when this case became final on direct appeal. See Graham v. Collins, 506 U.S. 461, 476 (1993). This conclusion obtains even more strongly with respect to Weeks' reliance on Bollenbach v. United States, 302 U.S. 607 (1946), where this Court held that if a jury instruction is defective the trial court should dispel the jury's professed difficulties "with concrete accuracy." 362 U.S. at 612-613. According to Weeks, there "is no principled reason for applying a different rule when the jury makes explicit its inability to comprehend an instruction...deem[ed] unambiguous." (Pet. at 20). Weeks' attempt to extend the rule of Bollenbach from the realm of defective instructions to the realm of constitutionally valid instructions clearly runs afoul of the new rule doctrine.

[4] At other times in his petition Weeks claims, contradictorily, that the jury's question demonstrated its actual misapprehension of its sentencing duties. (Pet. at 6, 21). In the Fourth Circuit, however, Weeks never claimed, as he does now, that the jury's question

II. Weeks' Claim That He Was Constitutionally Entitled To The Services Of Certain Forensic Experts, Which Is Unaccompanied By Any Supporting Factual Argument, Is Barred By The New Rule Doctrine And Does Not Present A Substantial Federal Constitutional Issue.

Despite Weeks' undisputed confession that he shot Trooper Cavazos six times, petitioner nevertheless claims that he was constitutionally entitled to the services of a ballistic expert and a forensic pathologist to develop a theory that he had not acted with premeditation. (Pet. at 3). Rejecting the Director's default argument, the Fourth Circuit held that Weeks had advanced a constitutional claim on direct appeal that he had been entitled to funding for such expert assistance, but that the Virginia Supreme Court had not addressed this due process claim. 176 F.3d at 262-263. Thus, the Fourth Circuit ruled that § 2254(d) does not apply to Weeks' claim because it was not adjudicated by the state court. The Court of Appeals concluded, however, that Ake v. Oklahoma, 470 U.S. 68 (1985), and Caldwell v. Mississippi, 472 U.S. 320 (1985), demonstrate that Weeks' claim seeks an impermissible "new rule." 176 3d at 263-266.[5]

Weeks asserts that this Court should grant certiorari to resolve a claimed conflict in the circuits over the proper standard of review governing an indigent defendant's motion for state-funded expert assistance. Specifically, Weeks says that federal and state

[5] While holding the Supreme Court of Virginia's failure on direct appeal to address Weeks' constitutional claim meant that the state court ruling was not reviewable under §

courts have reached widely varying conclusions as to the circumstances, if any, under which Ake authorizes funding for non-psychiatric expert assistance.

First, Weeks' own characterization of the circuits' divergent holdings as to the applicability of Ake to funding for non-psychiatric experts, as well as the level of necessity that a defendant must demonstrate to obtain such assistance, is strong evidence that the present claim is not cognizable under Teague. (Pet. at 22, 23, 28, 29). If, as Weeks repeatedly states, courts are divided on these matters, then it cannot possibly be said that the Supreme Court of Virginia's rejection of Weeks' claim was unreasonable or that the Fourth Circuit's rejection of his claim as Teague-barred was erroneous. Assuming that the courts are split in the manner claimed by Weeks, then the proper vehicle for resolving such disagreement would be a direct appeal case, not Weeks' federal collateral case.

A reasonable jurist certainly could have relied upon this Court's holding in Cardwell to find that Weeks had no constitutional entitlement to the assistance of a ballistics expert and a forensic pathologist. In Caldwell, in affirming the trial court's denial of motions for the appointment of an investigator, fingerprint expert, and ballistics expert in a death penalty case, the Court stated: "Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision....We therefore have no need to

habeas case. See Weeks, 176 F.3d at 265-266. Petitioner certainly cites no intervening precedent of this Court expanding upon Caldwell. See also McKinley v. Smith, 838 F.2d 1524 (11th Cir. 1988).[6]

Furthermore, most of the cases cited by Weeks in the present petition either were decided before this Court promulgated its new rule doctrine in Teague and its progeny, see, e.g., Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987) (en banc), or are state court decisions that would have had no occasion to address the Teague bar. (Pet. at 29-30). Weeks has not cited a single case in which a court has held that a reasonable jurist could not have relied upon Ake and Caldwell at the time Weeks' case became final to find that an indigent defendant had no constitutional right to non-psychiatric assistance.[7]

There is, moreover, a glaring omission in Weeks' petition; nowhere does he discuss the specific circumstances surrounding his acknowledged murder of Trooper Cavazos in terms of a supposed need for the requested experts. Yet, Weeks rightly concedes that a State is not constitutionally required to provide for an indigent defendant

---

[6] Weeks also contends that his claim is reviewable as an exception to Teague that allows the retroactive application of a "watershed rule of criminal procedure." Teague, 489 U.S. at 311. Inasmuch as "there is no doubt as to the cause of Trooper Cavazos' death," the Fourth Circuit rightly held this exception inapplicable to Weeks' claim. 176 F.3d at 266.

[7] Weeks' reliance upon Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920, cert. denied, 117 S.Ct. 1092 (1997), a case decided by the Virginia Supreme Court one year after Weeks' case became final on October 2, 1995, is wholly misplaced. In Husske, the

all of the services available to a wealthy defendant. See Ross v. Moffitt, 417 U.S. 600 (1974). Further, none of the cases that Weeks cites in his petition holds that an indigent defendant is not required to make **some** showing of necessity to entitle him to funding for expert assistance. Under these circumstances, Weeks' claim exists solely in a vacuum and cannot possibly show that the Fourth Circuit erred in dismissing this claim as Teague-barred or warrant the granting of certiorari.

The record makes clear that Weeks failed to demonstrate that he was entitled to expert assistance. That is, under the specific facts of this case, it simply was not "essential" to Weeks' preparation and presentation of an effective defense that he be provided with state-funded experts in pathology and ballistics.

First, as for the supposed "issue" of Weeks' premeditation in murdering Trooper Cavazos, petitioner suggested in the district court that the requested experts could have helped to determine both the amount of time elapsing between the shots and the "cause of death" of the officer. (App. 1382-1383). Under Virginia law, however, even if Weeks could have proven that he fired the six shots into Cavazos in a rapid-fire manner, this would not have undermined the proof of either the aggravated battery component of the vileness predicate or the premeditated nature of the slaying. The Supreme Court of Virginia has held that an aggravated battery is established by proof that the defendant "fired six pistol shots in rapid succession into [the victim's] head from a distance of three to eighteen inches." Gray v. Commonwealth, 233 Va. 313, 341, 352-354, 356 S.E.2d 157, 173, 180, cert. denied, 484 U.S. 873 (1987).

violation of the terms of his North Carolina probation by traveling to another state and riding in a car that he had stolen and by holding a gun sought in connection with a recent murder in North Carolina. Petitioner's car had stopped in "an extremely dark and isolated area" that drivers on the interstate highway could not see. (App. 855-856). The Supreme Court of Virginia expressly relied upon such evidence on direct appeal. Weeks v. Commonwealth, 248 Va. at 477, 450 S.E.2d at 390. Thus, both as a matter of state law and as a matter of fact, there is no basis for a conclusion that the requested experts somehow were "essential" on the issue of premeditation.

The jury's finding of the "vileness" aggravating factor was based upon both the "depravity of mind" and "aggravated battery" components. (App. 258). On direct appeal, Weeks did not challenge the jury's "depravity of mind" finding. As for the jury's "aggravated battery" finding, petitioner's sole contention was that the Commonwealth could satisfy this standard only by proof that there was some appreciable lapse of time between the first shot and the last. As previously demonstrated, however, the Virginia Supreme Court has held that firing six shots into a victim in rapid succession clearly establishes "aggravated battery." See Gray, 233 Va. at 341, 352-54, 356 S.E.2d at 173, 180.

Weeks testified in the penalty phase of the trial that he had shot the trooper several times with the pistol that Weeks had in his possession. Weeks admitted that Cavazos had been friendly during their encounter and had done nothing to provoke petitioner's lethal actions. The facts thus plainly proved that Weeks, acting in cold blood, killed Cavazos by shooting him repeatedly. No number of experts would have changed this fact. The

Weeks never could demonstrate the required need for experts, even if such a right were assumed to exist:

> [D]efendant, in an attempt to avoid arrest, shot the trooper at least six times from close range with a high-powered revolver, two of the shots being independently fatal, under the evidence. The officer posed no threat to defendant in connection with this routine traffic stop; the trooper died with his service revolver still enclosed in its holster. Then, the defendant left and returned to the scene, falsely claiming that he attempted to render assistance to the victim when his real purpose was to retrieve incriminating evidence.

Weeks v. Commonwealth, 248 Va. at 478, 450 S.E.2d at 391.[8]

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari and the application for a stay should be denied.

Respectfully submitted,

RONALD ANGELONE, Director,
Virginia Department of Corrections,

By: Robert H. Anderson III
Counsel

[8] It is noteworthy that neither in the Fourth Circuit nor in the present petition has Weeks challenged the district court's upholding the Magistrate Judge's denial of his motion for ballistics and forensic experts pursuant to 21 U.S.C. § 848(q)(9). (App. 1439-1455). See Weeks v. Angelone, 4 F.Supp.2d at 518-522. The district court concluded that the requested experts were not "reasonably necessary" within the meaning of § 848(q)(9). 4 F.Supp.2d at 520-522. Because the district court's denial of Weeks' motion for funding

Mark L. Earley
Attorney General of Virginia

Robert H. Anderson, III
Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

CERTIFICATE OF COUNSEL

On August 24, 1999, a copy of this brief was mailed to Timothy M. Richardson, Esquire and Glen A. Huff, Esquire, Huff, Poole & Mahoney, P.C., 4705 Columbus Street, Virginia Beach VA 23462 and Sterling H. Weaver, Sr., Esquire, P.O. Box 543, Portsmouth VA 23705, counsel for petitioner.

Robert H. Anderson III
Robert H. Anderson, III
Assistant Attorney General

death had on not only his family but on his co-workers. You will hear that Mrs. Cavazos will never be the same. You will hear that Jose had two children; these children, one of which is in college at this time, that they will never be the same.

You will hear that his fellow troopers will never the same. You will hear that, on at least one occasion -- you will hear from everybody -- but you will hear, for example, at least one trooper could not get out of his car after this happened, his patrol car, for some time.

You will hear that he did and still harbors thoughts of leaving the profession of law enforcement. This is the impact that the law is designed to, hopefully, protect against.

In addition to that, you will hear that the Defendant was on probation in the State of North Carolina at the time this happened. You will hear that the Defendant had been convicted of conspiracy to possess drugs with intent to distribute.

I would ask you, after you've heard all of the evidence, to weigh it carefully, using your common sense and your good judgment, knowing how awesome your

responsibility is, I would ask you to sentence him to death in accordance with law and in accordance with the evidence.

Thank you.

THE COURT: Thank you, Mr. Ebert. Mr. Baker, sir?

MR. BAKER: Thank you.

Ladies and gentlemen of the jury, like Mr. Ebert, I'd also like to thank you for your attention. It is obvious to us, both, to be sure, the Commonwealth and the defense, that you have paid very close attention to this case, and you have taken it very seriously, as such a case rates seriousness.

As Mr. Ebert states, the evidence will be presented here that the killing of Trooper Cavazos had a terrible impact, and the defense will not dispute it did not have a terrible impact on his wife and on his fellow troopers.

We could not dispute that that death did not have an impact and we could not say in any way that it was justified. We in opening statement never suggested that this individual had any right whatsoever to do this, because murder can never be justified under any

conditions.

However, what the jury must now do is decide the two alternatives that are open to them. That is, one, death; and the other, life in prison.

We will introduce evidence to show that this Defendant basically lead a good life for approximately eighteen years. He lived in a terrible neighborhood infested by drugs. Violence was rampant and yet he stayed out of trouble.

We'll show also that this individual was a regular churchgoer for eighteen years. I guess if there's anything to be learned outside this case, would be that going to church is good for one because, as Lonnie Weeks went to church, he never got in trouble. He never got in trouble.

As Mr. Ebert alluded to, this was an individual with some promise. This was an individual who was a star basketball player, an individual that probably could have been scholarship material to an ACC team and maybe have played in the NBA. Coach House will testify that he probably -- his coach at Fayetteville 71st High School -- will testify he was one of the finest basketball players he ever had, and he tried.

We'll also introduce evidence from his friends that Lonnie never, with the one exception, was a violent person. He didn't get in fights.

I believe Coach House will testify he never got ejected from a game. He never can remember him even getting a technical foul. For those of you who know something about basketball, a fierce competitor can get a technical foul rather easily because tempers do rise. But, that's not Lonnie Weeks' background.

So, you as the jury will have to consider this. Now, we won't submit to you that Lonnie Weeks did not go bad after he finished high school and after he quit going to church, because he certainly did things.

Mr. Ebert alluded to you he has a conviction for selling drugs. Yes, he does. He has one conviction on his record involving sale of marijuana, which he was sentenced to, I believe, three years in prison, suspended. That is the only conviction he has.

He has no juvenile record, and I'll submit to you, ladies and gentlemen of the jury, when you hear evidence of the neighborhood he came from and the type of -- shall we say -- community it was, he was the exception. That's what makes this all the more remarkable.

Now, the problem -- Lonnie did not get to go to college because of his grades. Even though he became academic ineligible his senior year, he still was recruited by a junior college, Mount Olive, and he was preparing to go there.

You'll also hear evidence that Lonnie has two children by two different women, but also that he cares about these children and he tried to support them. He wasn't able to get good jobs, so he sort of took the easy path.

Now, this is an individual that you will see the human side of him. What he did, obviously, cannot be forgiven. However, the question will be, should he pay the ultimate price for this, or is there enough goodness in this individual that this jury could find mercy in its heart to spare his life.

Ladies and gentlemen of the jury, that is the part of the trial that we now proceed with.

Thank you.

THE COURT: Mr. Ebert?

EVIDENCE ON BEHALF OF THE COMMONWEALTH

MR. EBERT: Sergeant Casey.

THE COURT: Sergeant Casey?

law, Mr. Willett.

MR. WILLETT: Sir, I do have that aggravated battery.

(Pause in proceedings.)

THE COURT: Counsel, have you had the opportunity to look at the instructions?

MR. BAKER: Yes, sir.

MR. WILLETT: Yes, sir.

THE COURT: Is there any objections to Commonwealth's Number One?

MR. MORISSETTE: No, Your Honor.

THE COURT: Is there any objection to Commonwealth's Number Two, I believe as agreed to?

MR. MORISSETTE: That's with the fine deleted, Your Honor?

THE COURT: That's my understanding.

MR. WILLETT: Yes, that's correct.

THE COURT: Mr. Willett, you're going to provide a clean copy?

MR. WILLETT: Yes, sir.

THE COURT: I see in the first part of the instruction you're going to have to delete some, as well as where you made some delineations later in the

instruction, line four, five.

MR. WILLETT: Yes, sir.

THE COURT: All right, sir. Then, that will be given by agreement?

MR. MORISSETTE: Well, I believe so, at this point, Your Honor, yes.

MR. BAKER: Yes, sir. We have no objection to it.

THE COURT: All right, then, it will given by agreement. Number three, Commonwealth's Number Three?

MR. BAKER: I don't have it.

MR. WILLETT: I just gave it to you a few seconds ago.

MR. EBERT: That's the one he just handed to you.

MR. BAKER: Okay, thank you. (Counsel examines document.)

I have no objection to it.

THE COURT: All right, sir, then as to the three that have been proffered by the Defendant, Al?

MR. EBERT: Objection to that, Your Honor.

THE COURT: All right, sir.

MR. EBERT: Your Honor, that's not a correct

Most poor people, almost all poor people, believe in the law and support it, and they don't break it.

If his poverty is an excuse for his crime, then our system of justice needs to be changed.

Judge Whisenant has told you something about the law which we will get to very briefly, but I want to touch on all the mitigation evidence that you've heard about what he was like as a young man; a basketball star, there were pictures -- they even introduced pictures of his children. We could have introduced pictures of Jose's children, too, but that's not what this case is about.

All of these people told you what he was like when he was young. None of them could tell you what he was like now, and I was struck by the similarity of the statements which the different witnesses made.

Ms. Vivien said, when she learned about the offense which Mr. Weeks had executed, "This couldn't be the Lonnie I used to know."

Donnie Reece, from his church, said, "I couldn't believe it was the Lonnie I once taught in Sunday school." Perhaps, most tragically, Mrs. Leach said, "I couldn't believe this was Lonnie, the boy I knew, that I

raised."

The boy that she knew and she raised is no longer among us. He disappeared many years ago, and he has been replaced by a man who would commit a crime such as this.

The law Judge Whisenant has told you about. The Commonwealth has to establish to your satisfaction either one of two things.

First, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

His testimony yesterday, his deviousness, and his purpose, which was to mislead you, is the most compelling evidence of his continued threat to society.

Forget all the crimes he's committed in the last -- well, he's only been out of High School for a couple of years, a year and a half, but look what he's done.

He's been busy. He's done just about every crime you can think of, with the exception of rape. Is there anything that is beyond him? Can you think of a crime that this man would not commit, given the year and a

Lonnie Weeks is not such a person. He had a religious background, and he was deeply moved. He has sinned. He has sinned. He does not deny that he has sinned, grievously, he has sinned.

He believes that if his soul is right he might go to heaven, and that's what he wants. Now, ladies and gentlemen, I submit to you that is really what the Christian religion is about.

The Commonwealth had alluded to you, in order to sentence this -- fix this defendant's sentence of death, you must find two things, and that is that --

MR. WILLETT: Excuse me, Judge. I hate to interrupt, but it would be either one of the things, not two things.

MR. BAKER: You're correct, Mr. Willett.

MR. WILLETT: Thank you.

MR. BAKER: I made a mistake. There are two factors you can consider, either one of which would justify a death sentence, and that is after considering his criminal history and background, there is a probability that he would constitute a continuing serious threat to society.

Or, that his conduct in committing the offense

was outrageously wanton and vile, or inhumane, it involved depravity of mind, or aggravated battery to the victim, beyond the minimum necessary to accomplish the act of murder.

Prior to this offense, the defendant had one conviction. Now, he committed a bunch of other offenses, and you can consider that. Now, you could still find that he meets both of these criterias, and not sentence him to death.

I believe you will read that in the instructions. Now, ladies and gentlemen, I stand before you, humbly. This defendant admits that he has committed a terrible crime. He has admitted that he has killed an innocent man. He has tried to tell you, although the Commonwealth will say it's a bunch of self-serving lies, what happened.

Now, ladies and gentlemen, he never said, an evil spirit. He tried to explain, but that was the Commonwealth's words. That was not his.

When he was being asked he tried to explain something that he has great difficulty in his own mind explaining, and I hope you understand that when you decide.

evidence. You've heard the evidence and you folks are going to have to determine what the appropriate punishment is in this case.

I take no pleasure in asking you to impose the death penalty. We have the death penalty and you don't have to impose it, but all of you have taken an oath that you can consider both options.

I would say to you folks that if you're going to have the death penalty, this case is the type of case that it's designed for. Now, why do I say that? Because we have to look at the defendant as you saw him today, and as he was on the day that this crime was committed.

There is no question about the fact, back when he was in High School, there is no evidence before you, that he was dangerous, that he had turned to a life of crime. That's not what we're dealing with here, folks. You're dealing with what we've got here today.

It's been pointed out earlier; he had every advantage -- I won't say, every advantage, but many advantages that other people don't have. Sure, his parents -- one died and the other one left him. One was a drug user, couldn't stand it, according to his grandmother, but this man didn't use drugs. This man sold

drugs for profit. That is the testimony and it's uncontradicted testimony before you. This man is greedy. This man is selfish.

That's what you have before you. He told you; he wanted money, and that's why he did what he did. That's why he sold drugs, that's why he broke in Mr. Farmer's house, that's why he stole his car.

Everything that he has done throughout this trial, I would submit to you, is an attempt to mitigate what might happen to him. He lied from the onset, throughout, to the Officer. And why? Because he was selfish and he didn't want to get caught and he didn't want to admit it.

Once he got -- he felt that the evidence was overwhelming, he changed his story a little bit. Then, he got on the stand yesterday, folks, and he told you certain things for one reason and one reason alone, and that was to mitigate the punishment that you're entitled to impose on him, that you've sworn to consider. under the law.

I say to you if you believe what he said on the stand yesterday, sentence him to life. If you don't, and you believe that the type of person that he is, that he was trying to serve himself, I say sentence him to

It dwelt within him when he sold drugs. It dwelt within him when he broke in a helpless man's home and took his belongings. It dwelt within him with he took his car.

Luther Washington (sic) told you why he was going to Washington, to sell it; and I say that's credible.

Now, what's incredible, to me, and you be the judge of it; he tells you, I'm going to bring the car back and park it. The man stole everything he had inside and ransacked the house, he's going to sell the television, stereo, get the money that he wanted so badly, and he says, oh, I'm going to take it back. I was just taking it for a little joyride, up to visit my relatives.

Folks, I say that's baloney. That's the person you're dealing with.

Everything he does is calculated for his self-interest. What so tragic about it, and God knows nobody likes to come out of poverty. He didn't have to be that way. He had jobs. The system, the judicial system such as we've had, gave him an opportunity; putting him on probation.

And the Judge, no doubt, heard every word you heard yesterday in mitigation, what a nice fellow he was,

No. 99-5746
A. 99A151

(5)

IN THE
SUPREME COURT OF THE UNITED STATES

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

Supreme Court, U.S.
FILED
AUG 25 1999
OFFICE OF THE CLERK

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY OF EXECUTION

Imminent Execution Scheduled
September 1, 1999

Sterling H. Weaver, Sr., Esq.
P.O. Box 543
Portsmouth, VA 23705
(757) 393-0237

Counsel for Petitioner

Glen A. Huff, Esq.
Timothy M. Richardson, Esq.
Counsel of Record
Huff, Poole & Mahoney, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
(757) 499-1841

Counsel for Petitioner

RECEIVED
AUG 26 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

6 pp

The Director's arguments are, for the most part, either refuted in Weeks' petition for a writ of certiorari or refuted by principles of logic that this Court undoubtedly can apply without assistance from the petitioner.[1] Weeks therefore limits this reply to an issue that the Director has newly injected into the Brief in Opposition: whether, if Weeks is correct about the meaning of *Ake*, he could have made a sufficient showing of need to support his pretrial motion for nonpsychiatric experts, such that the error in denying the expert assistance was not harmless.

No court has held that Weeks did not make an adequate showing of need. The trial court rejected Weeks' request for funding on the ground that pathology and firearms issues are ones on which experts could not differ, not on the ground that Weeks made an insufficient showing of need. (R. at 641- 43.) *That* decision by the trial court, and not some supposed deficiency in Weeks' pretrial motion, underlies Weeks' constitutional claim. On direct appeal, the state court rejected Weeks' claim without addressing the substance of the issue presented. (Appendix ("App.") at 80.) The district court and the court of appeals decided that Weeks' constitutional claim was barred as a threshold matter of law by the new rule doctrine. (App. at 51, 71.) None of these courts held, in the alternative, that Weeks did not make an adequate showing of need.

The premise of *Ake*, and a component of its substantive constitutional rule, is that the defendant needs an expert to meet the state's case. By pointing to the state's version of the facts — a version that Weeks was unable to rebut without independent nonpsychiatric experts — the Director merely shows that denying Weeks access to the nonpsychiatric experts handicapped Weeks' defense and effectively prevented Weeks from countering the state's case at trial.

---

[1]For example, the Director suggests that the *Teague* issue should be resolved in a direct appeal case. Obviously, *Teague* issues arise only in collateral proceedings.

Weeks raised numerous significant and specific questions related to premeditation and aggravated battery in his pretrial request for expert assistance; answers to those questions either had not been ascertained by the state's forensic experts, or the conclusions of the state's experts appeared to contradict other evidence. (R. at 151-53; 155-156) If Weeks had been afforded an independent pathologist and firearms expert, he would have shown that, in stark contrast to *Gray v. Commonwealth*, 356 S.E.2d 157 (Va. 1987), the shooting was not a close-up, execution-style killing and was the product of a panicked, impulsive shooting along the length of a motor vehicle. He also would have shown that the "pull" on the gun was so light that a panicked individual could unintentionally fire multiple shots when he intended, at most, to fire only once. *See Barnes v. Commonwealth*, 360 S.E.2d 196, 203 (Va. 1987) (multiple gunshot wounds do not constitute aggravated battery if death is instantaneous and there is not an appreciable lapse of time between shots fired). This evidence, if believed by the jurors, would have affected their decision on guilt and/or sentence.

CONCLUSION

The Court should grant a writ of certiorari on each of Weeks' questions presented.

Respectfully submitted,

Sterling H. Weaver, Sr., Esq.
P.O. Box 543
Portsmouth, VA 23705
(757) 393-0237

Counsel for Petitioner

Glen A. Huff, Esq.
Timothy M. Richardson, Esq.
Counsel of Record
HUFF, POOLE & MAHONEY, P.C.
4705 Columbus Street
Virginia Beach, Virginia 23462
(757) 499-1841

No. 88-5746
A. 99A151

IN THE
SUPREME COURT OF THE UNITED STATES

LONNIE WEEKS, JR.,
Petitioner,
v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

CERTIFICATE OF SERVICE OF REPLY BRIEF

I hereby certify that I am a member of the Bar of this Court and that on August 25, 1999, pursuant to Rule 29.3 of the Rules of United States Supreme Court, I caused a copy of the Reply Brief to be served by facsimile and regular mail on Robert Anderson, Esq., Assistant Attorney General, 900 E. Main Street, Richmond, VA 23219.

Counsel for Lonnie Weeks, Jr.

Sterling H. Weaver, Sr., Esq.
P.O. Box 543
Portsmouth, VA 23705
(757) 393-0237

Glen A. Huff, Esq.
Timothy M. Richardson, Esq.
Counsel of Record
HUFF, POOLE & MAHONEY, P.C.
4705 Columbus Street
Virginia Beach, Virginia 23462
(757) 499-1841

Law Offices Of
Huff Poole & Mahoney P.C.

Timothy M. Richardson, Esq.
E-mail: trichardson@hpmlaw.com

August 25, 1999

VIA TELECOPIER/FEDERAL EXPRESS

Mr. Chris Vasil
c/o Clerk's Office
United States Supreme Court
One 1st Street, N.E.
Washington, DC 20543

Re: Lonnie Weeks, Jr. v. Ronald Angelone, Director,
Virginia Department of Corrections
No. 99-5746
Scheduled Execution Date: September 1, 1999

Dear Mr. Vasil:

Enclosed please find Petitioner's Reply in Support of Petition for a Writ of Certiorari and Application for a Stay of Execution, which we ask that you please file in the referenced matter. We will send you the original by Federal Express.

If you should have any questions, please do not hesitate to contact us.

Very truly yours,

HUFF, POOLE & MAHONEY, P.C.

By
Timothy M. Richardson

TMR:vaw
Enclosure
cc w/encl: Robert H. Anderson, III (Via Telecopier)

RECEIVED
AUG 26 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 99-5746

FILED
OCT 13 1999
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, Director,
Virginia Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONER

GLEN A. HUFF, ESQ.
TIMOTHY M. RICHARDSON, ESQ.
Counsel of Record
HUFF, POOLE & MAHONEY, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
(757) 499-1841

STERLING H. WEAVER, SR., ESQ.
P.O. Box 543
Portsmouth, VA 23705
(757) 393-0237

MARK EVAN OLIVE, ESQ.
LAW OFFICES OF
MARK E. OLIVE, P.A.
320 West Jefferson Street
Tallahassee, FL 32301
(850) 224-0004

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

36 pp

CAPITAL CASE

QUESTION PRESENTED

When a capital sentencing jury informs the judge that it does not understand the sentencing instructions held facially constitutional in *Buchanan v. Angelone* and specifically asks whether it is free to consider a sentence less than death if it finds one or more aggravating factors, is the judge constitutionally required to clarify that a death sentence is not mandatory upon the finding of an aggravating factor but that the jury should consider mitigating evidence as well in making its sentencing decision?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	19
ARGUMENT	20
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Barclay v. Florida, 463 U.S. 939 (1983) 24

Beck v. Alabama, 447 U.S. 625 (1980) 20

Bollenbach v. United States, 326 U.S. 607 (1946) 27

Boyde v. California, 494 U.S. 370 (1990) 18, 20, 23, 25, 27

Buchanan v. Angelone, 522 U.S. 269, 118 S. Ct. 757 (1998) 18, 21, 24, 27, 28, 29

Burger v. Kemp, 483 U.S. 776 (1987) 22

Calderon v. Coleman, 525 U.S. 141 (1998) 23

California v. Brown, 479 U.S. 538 (1987) 21

California v. Ramos, 463 U.S. 992 (1983) 24

Cardwell v. Greene, 152 F.3d 331 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 587 (1998) 17

Clemons v. Mississippi, 494 U.S. 738 (1990) 23

Eddings v. Oklahoma, 455 U.S. 104 (1982) 19, 21, 22, 23, 28, 29

Estelle v. McGuire, 502 U.S. 62 (1991) 23, 25

Gregg v. Georgia, 428 U.S. 153 (1976) 29

Godfrey v. Georgia, 446 U.S. 420 (1980) 29

Harris v. Alabama, 513 U.S. 504 (1995) 22

Hitchcock v. Dugger, 481 U.S. 393 (1987) 22, 23, 29

Johnson v. Mississippi, 486 U.S. 578 (1988) 20

Johnson v. Texas, 509 U.S. 350 (1993) 20

Jurek v. Texas, 428 U.S. 262 (1976) 27, 29

TABLE OF AUTHORITIES – Continued

Page

Lockett v. Ohio, 438 U.S. 586 (1978) 19, 21, 23, 25, 27, 28, 29

McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 1795 (1998) 28

McKoy v. North Carolina, 494 U.S. 433 (1990)..... 21

Mills v. Maryland, 486 U.S. 367 (1988) 21, 23, 25, 29

Morgan v. Illinois, 504 U.S. 719 (1992) 22

Parker v. Dugger, 498 U.S. 308 (1991) 22, 23, 29

Penry v. Lynaugh, 492 U.S. 302 (1989)..21, 23, 25, 27, 29

Proffit v. Florida, 428 U.S. 242 (1976)..... 29

Saffle v. Parks, 494 U.S. 484 (1990)..... 22

Simmons v. South Carolina, 512 U.S. 154 (1994)..... 26

Skipper v. South Carolina, 476 U.S. 1 (1986) 22, 29

United States v. Nunez, 889 F.2d 1564 (6th Cir. 1989) 28

United States v. Zimmermann, 943 F.2d 1204 (10th Cir. 1991) 28

Weeks v. Commonwealth, 450 S.E.2d 379 (Va. 1994) ..1, 17

Weeks v. Virginia, 516 U.S. 829 (1995)..... 17

Weeks v. Angelone, 4 F.Supp.2d 497 (E.D.Va. 1998), *aff'd*, 176 F.3d 249 (4th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3151-52 (Sept. 1, 1999).....1, 17

Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3151-52 (Sept. 1, 1999).....1, 17

Weeks v. Angelone, 68 U.S.L.W. 3151-52 (Sept. 1, 1999)..... 1

Woodson v. North Carolina, 428 U.S. 280 (1976) .. 20, 21, 23

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported as *Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999), and is reprinted in the Joint Appendix (hereinafter "J.A.") at pages 327 through 377. The opinion of the district court is reported as *Weeks v. Angelone*, 4 F. Supp.2d 497 (E.D. Va. 1998). The opinion of the Virginia Supreme Court on direct review is reported as *Weeks v. Commonwealth*, 450 S.E.2d 379 (Va. 1994), and is reprinted in the J.A. at pages 272 through 296.

JURISDICTION

The court of appeals issued its judgment and decision on May 10, 1999. Mr. Weeks filed a timely petition for rehearing and suggestion for rehearing *en banc* on May 21, 1999. The court of appeals denied the petition for rehearing on June 4, 1999. The petition for certiorari was filed on August 16, 1999, and was granted (limited to Question Presented 1) on September 1, 1999. *Weeks v. Angelone*, 68 U.S.L.W. 3151-52 (Sept. 1, 1999). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution, which provide in relevant part as follows:

"[N]or [shall] cruel and unusual punishments [be] inflicted." (U.S. Const., amend. VIII.)

"No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., amend. XIV, § 1.)

STATEMENT OF THE CASE

Lonnie Weeks, Jr., was convicted in the Commonwealth of Virginia for the capital murder of State Trooper Jose M. Cavazos. There was no dispute about whether Mr. Weeks shot and killed the law enforcement officer. He did. The real issue for the jury to decide was punishment. Thus, it was critical that Lonnie Weeks' sentencers understand their duty to consider – and realize their power to give effect to – evidence in mitigation as well as evidence in aggravation of sentence.

A. The Mitigating Evidence

The evidence in mitigation was, summarily, this: The offense occurred when Lonnie Weeks, Jr., was just twenty years old. Mr. Weeks was an African-American man who had been raised in a poor, violent neighborhood. Yet in spite of his surroundings, at age eighteen, Mr. Weeks was (1) the star, captain, and leader of his high school basketball team, (2) a devout Christian and constant churchgoer, and (3) a peaceful, non-criminal, non-violent, productive member of his community. Colleges recruited Mr. Weeks with athletic scholarships.

Mr. Weeks then made a fateful decision. He turned the scholarships down because his girlfriend was pregnant and he felt an obligation to remain with her. After graduation from high school, he left his grandmother's home and moved in with his girlfriend. Thereafter, without school, church, and the support of his grandmother, Mr. Weeks entered the world of poverty and crime around him. He made a series of awful decisions, and his life quickly unraveled, culminating in his theft of a car and the shooting of the law enforcement officer who flagged it down while he was riding in it as a passenger. When it was over, Weeks looked back in horror and disgust at what he had done.

With more texture:

1. *A Promising Start in Precarious Circumstances*

The story of Lonnie Weeks' short life was told at sentencing. His family moved to Fayetteville, North Carolina, from Washington, D.C., when he was seven years old. (J.A. at 158.) His father died when he was ten. Mr. Weeks was raised by his grandmother, Evelyn Leach, because his mother had become "caught up in drugs" and was not able to care for him. (J.A. at 167, 143.)

Ms. Leach lived in a "horrible area" with "drugs, weapons, shootings, killings," (J.A. at 131-32), and she was in a "very, very hard situation economically." (J.A. at 134.) But she was a hard-working, church-going, strict "parent," and Lonnie Weeks thrived under her influence. He was polite, well-behaved, well-mannered, industrious, respectful, and religious. (J.A. at 143-47, 153, 168.) His grandmother "never got no calls from school, never

got no calls from the principal, teachers or nobody like that about Lonnie." (J.A. at 168.)

Other responsible adults also helped Lonnie Weeks to stay out of trouble, for example, his basketball coach, Bennie House. Coach House had a great deal of contact with Lonnie Weeks, almost daily, for three years. (J.A. at 130-31.) Mr. Weeks had no disciplinary record at school, and, in sports, had "[n]ever a fight; never a technical; always – always handled himself real well." (J.A. at 133.) Mr. Weeks "developed into a very fine basketball player" and "had to shoulder a lot of responsibility" as a senior, but, "unfortunately, we lost him in January with grades. That was the only thing negative I can say . . . As much as I talked and encouraged his grades, he still came up short in two courses [at mid-term]." (J.A. at 132.) But "he came back strong and, of course, he graduated in '91 at 71st High School." (J.A. at 132.)

Another person who "saw a lot of potentials in Lonnie" was Sergeant Major Bryant (retired from the Army) who was a neighbor. Bryant came to know Lonnie Weeks "after he had that traumatic moment with his father . . . so I kind of took up on him." (J.A. at 152.) Bryant was hopeful about "the potentials I saw in Lonnie going to college and his ambition for wanting to go to college, I wanted him to make his decision, his mind up which direction he wanted to go." (J.A. at 152.)

Donny Dees also knew Lonnie Weeks well for over a decade. Dees testified that "from 1979 to 1991, I served as his Youth and Christian Education Director, and his sophomore, junior, and senior year in high school, I was his Sunday School teacher" at the C and Adams Street

Church of God. (J.A. at 163.) Dees was also a counselor in the Fayetteville public schools, and knew Mr. Weeks "through church, and from church through school. . . . " (J.A. at 162.) According to Dees, "[y]ou could almost count on [Mr. Weeks] being [in church] every Sunday." (J.A. at 163.) Mr. Weeks "would participate in [Sunday School] class" and was "sensitive from the standpoint, a lot of times in class he would weep and cry over – from the standpoint of – from the lesson." (J.A. at 164.) Dees encouraged Mr. Weeks to go to college. (J.A. at 163.) Upon Mr. Weeks' graduation, Dees moved to a new church and did not see Mr. Weeks anymore. (J.A. at 164.)

2. *A Support System is Dismantled*

Mr. Weeks' grandmother, school, and church had insulated him from his "horrible" neighborhood.[1] After a very short period of time he found himself without this support system in an environment that presented unfamiliar problems and bad temptations. He did not do well on his own.

First, Mr. Weeks moved out of his grandmother's house and in with his girlfriend. (J.A. at 170.) According to Mr. Weeks' grandmother, "she came up with this baby after Lonnie graduated from high school and said that it

---

[1] Mr. Weeks testified that, before he graduated, "I really couldn't have gotten in trouble because I was so busy with basketball during the school time and, in the summertime, I was at basketball camp, and I was going to church and my life just felt like it was right. The trouble was – I wasn't around anyone who really got into trouble – I just wasn't around any trouble." (J.A. at 126.)

was Lonnie's baby, and that's all I knew, and Lonnie accepted the baby as his baby." (J.A. at 174.)

Second, Mr. Weeks graduated from high school and did not continue on to college. Sergeant Major Bryant explained that Mr. Weeks did not go to college because of his girlfriend's baby. "He was a kid that was from a broken home, and I guess he didn't want to see that happen to his kid." (J.A. at 153.) Mr. Weeks testified that he did not take advantage of his college athletic scholarships because "I was involved with a young lady . . . and she was pregnant and . . . I didn't want to leave her by herself." (J.A. at 109.) "My grandmother was encouraging me to go to college . . . [b]ut, at the time, I was thinking that I was doing the right thing by being by her side and waiting to go to college later." (J.A. at 109.)

Third, Mr. Weeks stopped going to church. (J.A. at 110.) He was well known as a superb athlete and people wanted to talk to him about that, but

> I was depressed about my life because everywhere I went, strangers [sic] that I knew, they always say, "Why you not in college? What are you doing?" . . . My family and friends, they used to just always tell me that I need to go to college, and I became very depressed. I felt like I let everybody down; and that I was depressed, I guess I really didn't try to focus on being back with the Lord, so I can get my life back right.

(J.A. at 127.)

Mr. Weeks worked a series of menial jobs, but never earned enough money even to have a car. (J.A. at 111-12.) Other young men in the neighborhood appeared to make a lot of money selling drugs, (J.A. at 114), and Mr. Weeks

finally started hanging out with this "bad medicine." (J.A. at 153) (Sergeant Major Bryant's testimony); *see also* (J.A. at 150) ("wrong crowd") (Juaneza Vivian, another neighbor.) Mr. Weeks testified that "[w]e was kind of struggling, so I thought I'd just take the easy way out." (J.A. at 113.) He started selling marijuana with several other persons, all of whom had criminal records. (J.A. at 90-91.) Mr. Weeks was arrested, pleaded guilty, and received a three year sentence, suspended, and five years probation. (J.A. at 113.) It was his first offense. (J.A. at 93.)

3. *Events Preceding the Murder of Trooper Cavazos*

The series of events that culminated in Trooper Cavazos' murder began with a suggestion by Luther J. Waddell. Luther J. Waddell went to high school with Lonnie Weeks but graduated first and started serving prison sentences. (J.A. at 73.) After he got out of prison in 1992, he lived in Mr. Weeks' neighborhood, and they became associates. (J.A. at 73.)

They sold marijuana together.[2] Another drug seller in the neighborhood (Dutlow) did not want them selling

---

[2] The state contended that Mr. Weeks was also selling crack cocaine, but the police found none when he was arrested for his first offense. (J.A. at 92.) Mr. Weeks testified that he wanted to sell cocaine, but that he never could get enough money together to do so. (J.A. at 114.) Luther J. Waddell testified that he sold cocaine, and suggested that Mr. Weeks did also, (J.A. at 78), but Mr. Weeks testified that Waddell was lying. (J.A. at 182.) Waddell was in prison at the time of his testimony. (J.A. at 72-73.)

there so he hit Mr. Weeks in the head with a pistol and threatened to kill him – "[h]e kept saying he was going to kill me if he saw me or kill Luther if he saw him." (J.A. at 116, 77.) Mr. Weeks had agreed to "hold" a pistol for a friend,[3] and "once the threats [from Dutlow] started getting worse, I felt that I had to have it." (J.A. at 114, 116.)

Luther learned that a neighborhood house was going to be unoccupied because the occupant was in jail. (J.A. at 74.) Luther planned to burglarize the house, and asked Mr. Weeks to go with him. (J.A. at 117.) Mr. Weeks talked with his girlfriend about it, and she said, " '[T]hat's not you. Don't go.' " (J.A. at 117.) As Mr. Weeks testified, "I didn't – you know, I didn't break into houses or think about doing things like that, I guess, until – until Luther came along. I started hanging out with him, I'd say, about two months – two months. . . . I kind of felt like my life was going down the drain. I missed opportunities that I had. I was having really some problems." (J.A. at 126-27.) "But," Mr. Weeks testified, "I was being more and more tempted by Luther, you know, to get some money." (J.A. at 117.) They went to the house in Luther's girlfriend's truck. (J.A. at 74.) They broke in and took electronic equipment. (J.A. at 75.) Mr. Weeks found car keys; the keys fit a car outside, and Mr. Weeks took it. (J.A. at 76.)

Mr. Weeks said he took the car because "right then that moment I was kind of excited to have – to be able to have a car that maybe I could drive that I never had."

---

[3] The friend asked Mr. Weeks to keep the pistol for a while because it had been used in a shooting. (J.A. at 114.) Mr. Weeks agreed to help his friend out, and he took the pistol and hid it under the house where he stayed. (J.A. at 116.)

(J.A. at 118.) He decided to drive the car to visit some family members the next day in Washington, D.C. (J.A. at 118.) His cousin, Eric Baker, went with him as far as Richmond, Virginia, and then Mr. Weeks went on to Washington, D.C. (J.A. at 119.)

Mr. Weeks stayed several days, and then Baker telephoned him and asked him to drive down to Richmond to pick him up. (J.A. at 119-20.) Mr. Weeks protested because of the late hour but ultimately agreed. (J.A. at 120.) Mr. Weeks was going to go alone, but his uncle, Louis Dukes, said "it was kind of late and you need somebody with you." (J.A. at 120-21.) They agreed that Dukes would drive on the way to Richmond, and Mr. Weeks would drive on the way back. (J.A. at 120.)

4. *The Murder of Trooper Cavazos*

Mr. Weeks testified that Dukes was speeding on the interstate on the way to Richmond. (J.A. at 121.) A police car came up behind them, and Dukes pulled over near the ramp to Dale City, on or near an overpass or bridge. (J.A. at 121.) Mr. Weeks was very nervous because he was on probation, and because the car was stolen. (J.A. at 121.) The officer told Dukes to step out of the car, and he did. Mr. Weeks was told to step out, and he looked down and saw the pistol his friend had asked him to hold. (J.A. at 122.) He intended to grab it and throw it over the rail of the bridge as he got out of the front seat. (J.A. at 122.)

Mr. Weeks explained as best he could what happened next:

[M]aybe a Christian or a person who believes in God and the devil will understand what I'm about to say. And, as I stepped out of the car, it was just like something had just took over me that I couldn't understand. It was like something – I felt like something – the best way I can describe it is like something – I can't say something. I knew what it – well, to me, I felt like it was evil – evil spirit or something. That's how I feel. That's the best way to describe it.

In my body, I just – I mean, I couldn't hear nothing, and I just remember afterwards, not at the time, that I started firing the gun. And, once it stopped, I remember my ears popping. My hand came back and it was like something just left me, like left me just standing there, and I couldn't – I was standing there looking at the trooper, and I was just in a daze, couldn't believe what just happened.

I didn't want to believe what just happened, but I knew that I had done it, because it just was in my hand. But I still couldn't believe it, so I was standing there, and I looked at my uncle, and he almost looked, maybe as a ghost or something.

He had a lot of fear in his face, and I guess he figured – I mean, he knowed [sic] that I had never even attempted to do anything violent before. . . .

(J.A. at 122-23.) Dukes came around to the passenger side of the car and told Mr. Weeks to get in. "I still couldn't move and he had to push me." (J.A. at 124.) They drove away, and then Mr. Weeks ran back to the scene. Emergency personnel were there: "I wanted to say something, but I was just too scared to; I couldn't. I know the good in

me wanted to, but I guess the bad in me just wouldn't let me." (J.A. at 124-25.)[4]

5. *Responsibility and Remorse*

Mr. Weeks testified further in mitigation:

- "I apologize for what I have done. I feel that I took an innocent man's life." (J.A. at 127.)
- "I also know that what I have done, it was very – it's very wrong, is hurting, because I know what it feels like to lose somebody that you love." *Id.*
- "I've hurt my own family, as well as his family. Sometimes I actually feel like I can't live with myself, but that, now that I'm back with the Lord, He give me the strength." (J.A. at 128.)
- "I pray for my family and his family every night." *Id.*
- "I feel very ashamed and low. . . . Hearing those things [the victim's qualities, and the pain caused], every time I hear someone talk about Mr. Cavazos, I begin to cry because it hurts me. It hurts me so bad into my heart

---

[4] Mr. Weeks' family members and friends expressed shocked disbelief when they learned that he had committed this crime. (J.A. at 147 ("shocked . . . really shocked"); 165 ("I couldn't believe it. . . . I thought she had the wrong person"); 147-48 ("[I]t was just totally out of character for Lonnie . . . I was just horrified, to tell you the truth."); 172 ("I couldn't believe this was Lonnie. . . . "))

that sometimes I actually feel like I could die from that pain." (J.A. at 128.)[5]

- "I guess I felt like I didn't need [the Lord] any more, and so, to myself I say, well, I'm paying for – by my turning my back on Him, I obviously have an indecent mind." (J.A. at 125.)

B. The Jurors' Question – What Is Their "Duty"?

Before *voir dire*, defense counsel sought permission to ask the jurors Proposed Juror Question 13, which was: "Do you promise to seek further instructions from the judge *if you do not fully understand* the meaning of any of the instructions he gives you?" (J.A. at 10, 13.) (emphasis added). Counsel also asked permission to ask the jurors Proposed Juror Question 14, which was: "Do you promise to seek further instruction from the judge *if there is a disagreement among jurors as to* the meaning of any of the instructions the judge gives you?" (J.A. at 10, 14.)

---

[5] This testimony was in response to a question by defense counsel regarding how it made Mr. Weeks feel to hear the Commonwealth's evidence in aggravation which had focused on the victim's good traits, and the impact of his death on his colleagues and family. (J.A. at 102-03) (widow describing family's anguish and psychological effects); (J.A. at 94) (fellow officer testifies the victim was "very highly regarded and revered"); (J.A. at 100) (victim was "very kind person"); (J.A. at 97-99) (first officer on the scene suffers psychologically); (J.A. at 98) (officers experienced "[p]anic, disbelief, anger, helplessness," and "you sort of question your faith in people."); (J.A. at 95) (at police meeting after the victim's death an officer had "never seen the outpouring of grief, sorrow and hurt that I saw at [that] meeting.").

(emphasis added). The judge allowed Question 13, but not Question 14, finding that "thirteen covers it." (J.A. at 15.) According to the judge, "if they *understand*, there's not going to be any *disagreement*. If you have *disagreement*, that means they're not going to *understand*." *Id.* (emphasis added). All the jurors were asked the "if you do not fully understand" question. (*See*, e.g., J.A. at 24-25, 31, 40, 46, 54, 62.) The judge concluded that this instruction "covers" situations of jury disagreement or confusion and that "if they have a problem with an instruction, we've told them to come for further instructions." (J.A. at 15.)

The following pattern instruction, referenced as "Instruction No. 2," was given to the jury, orally and in writing, at sentencing:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or imprisonment for life and a fine of a specific amount, but not more than $100,000.00. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> 1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
>
> 2. That his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman, in that it involved depravity of mind or aggravated battery to

> the victim beyond the minimum necessary to accomplish the act of murder.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.
>
> If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

(J.A. at 192-93, 199-200.) Before this instruction was given, and during a charge conference, defense counsel argued that this pattern instruction was not sufficient.

Counsel argued that "the jury has to be instructed that . . . even if they find the aggravating factors beyond a reasonable doubt, that they have to be instructed that they can still give effect to the evidence in mitigation by sentencing the defendant to life, as opposed to death." (J.A. at 178.) Counsel then referred to the "finding forms" (forms the jurors have to fill out at sentencing) and noted that "[t]here is no finding form for finding either one or both of the aggravating factors beyond a reasonable doubt, and still sentencing the Defendant to life in

prison." (J.A. at 179.)[6] "[W]e would ask that Your Honor instruct the jury that even if they find one or both [aggravating circumstances] that they still may impose a life sentence[.]" (J.A. at 223.) Counsel commented that: "[I]t is not clear to the jury that, if they find beyond a reasonable doubt that the aggravating factors have been proved, that they can still chose [sic] to sentence the Defendant to life in prison[.]" (J.A. at 179.) Weeks' attorney asked the court to instruct the jurors in such a way as to inform them that "even though they find whatever aggravating factors there are beyond a reasonable doubt, they can still sentence the defendant to life in prison." (J.A. at 180.)

The trial court concluded that the second paragraph in the pattern instruction "covers what you've [counsel] argued . . . and that it does let them know that they can sentence someone to life. . . . That is the model jury instruction. I certainly think it accomplishes what the federal law requires." (J.A. at 181.) The jurors were given a written copy of the instructions as well as the verdict finding forms to take into the jury room with them, and they retired.[7] (J.A. at 188, 219.) Eighty minutes later, the jurors sent out a written question asking whether a sentence of life imprisonment would include the possibility

---

[6] The following day the trial judge asked counsel to examine the proposed verdict forms, and counsel renewed their objection to them: the jury "forms do not expressly provide for a sentence of life imprisonment, upon finding beyond a reasonable doubt, on one or both of the aggravating factors." (J.A. at 185-86.)

[7] All of the verdict forms provided to the jury at sentencing are included in the Joint Appendix (J.A. at 196-198.)

of parole. (J.A. at 217, 219.) The trial court refused to answer this question, instead advising the jury that it should "impose such punishment as you feel is just under the evidence, and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." (J.A. at 219.) The jury returned to its deliberations.

After almost three more hours of deliberation, the jury sent out a second written question:

> If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? or must we decide (even though he is guilty of 1 of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify.

(J.A. at 217, 222) (emphases in original.)

. Defense counsel "ask[ed] that Your Honor instruct the jury that even if they find one or both of the mitigating factors – I'm sorry, the factors that have been proved beyond a reasonable doubt, that they still may impose a life sentence, or a life sentence plus a fine." (J.A. at 223.) The trial court denied this request. Instead, the trial judge wrote on the bottom of the jury's inquiry: "See second paragraph of Instruction #2, (Beginning with 'If you find from . . . ')."[8] (J.A. at 217, 223.) The jury then returned to its deliberations.

A little over two hours later, the jury fixed Lonnie Weeks' sentence at death based on the sole aggravating

[8] Instruction No. 2 is reprinted in full at pp. 13-14, *supra*.

factor that the crime was outrageously or wantonly vile, horrible or inhuman. (J.A. at 225, 228.) The transcript records that "a majority of the jury members [were] in tears" as they delivered their sentence. (J.A. at 225.)

C. The Direct Appeal

Mr. Weeks asserted on direct appeal that his rights under the Eighth and Fourteenth Amendments were violated by the trial court's refusal to clarify the capital sentencing instruction after the court received a specific jury request to decipher the rule of law. (J.A. at 238, 245-46.) The Virginia Supreme Court summarily rejected this claim. *Weeks v. Commonwealth*, 450 S.E.2d at 383 ("no merit"); *id.* at 390 ("In conclusion, defendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and *inquiries by the jury during its deliberations*. We have considered all the arguments in support of those issues and conclude that none has any merit." (emphasis added)).[9] This Court denied certiorari. *Weeks v. Virginia*, 516 U.S. 829 (1995).

[9] *See Weeks v. Angelone*, 176 F.3d at 259 ("The Supreme Court of Virginia therefore adjudicated assigned error no. 44 on the merits, allowing us to review this claim in a federal habeas proceeding.") (J.A. at 341); and *Weeks v. Angelone*, 4 F. Supp.2d at 536. Given the perfunctory manner in which the Virginia Supreme Court denied Mr. Weeks' claim, de novo review is appropriate in federal habeas corpus proceedings. *See Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 587 (1998) (When state court provides "perfunctory decision" and fails to "articulate any rationale" for rejecting claim, federal habeas corpus court "must independently ascertain whether the record reveals a violation of [federal law].")

D. The Federal Habeas Corpus Proceedings Below

After exhausting state remedies, Mr. Weeks filed a federal habeas petition alleging, *inter alia*, that the trial court had violated the Eighth and Fourteenth Amendments by not ensuring that the jurors understood their duty to consider and give effect to evidence in mitigation. The court of appeals affirmed the district court's rejection of this claim, relying upon this Court's holdings and analyses in *Buchanan v. Angelone*, 522 U.S. 269, 118 S. Ct. 757 (1998), and *Boyde v. California*, 494 U.S. 370 (1990). Because this Court had found in the *Buchanan* case that the Virginia pattern instruction was unambiguous on its face, the Fourth Circuit reasoned that "no reasonable juror would have understood the sentencing instruction to preclude the consideration of mitigating evidence even upon a finding of an aggravating factor." (J.A. at 345.) The Fourth Circuit observed that Mr. Weeks, like Buchanan, had presented evidence about his background and character and concluded that for this reason the jury must have known that it was required to consider this evidence *after* concluding that Mr. Weeks was eligible for death. " '[W]e think it unlikely that reasonable jurors would believe the court's instructions transformed all of this favorable testimony into a virtual charade.' " (J.A. at 345) (quoting *Boyde*, 494 U.S. at 383.) And the court of appeals further observed that Mr. Weeks' jurors, like Buchanan's, had filled out a pre-printed verdict form reciting that they sentenced Mr. Weeks to death after considering mitigating evidence. (J.A. at 345.)

SUMMARY OF THE ARGUMENT

Lonnie Weeks was not sentenced to death by a hypothetical jury. He was sentenced to death by twelve real people in Virginia. His case is not controlled by what the Fourth Circuit thinks a hypothetical jury would have understood, or what it thinks Mr. Weeks' jury *should* have understood, after hearing the evidence and receiving the judge's instructions. After they heard the evidence and received the instructions, both orally and in writing[10], these jurors asked a question in which they posited two alternative understandings of their duty under the law, one of which flatly violated the most basic principles of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and they asked the judge which understanding was correct.

Despite having heard Virginia's facially constitutional pattern jury instruction and the presentation of mitigating evidence, these twelve people failed to understand that the finding of an aggravating factor did *not* impose a "duty" to "issue" a death sentence and did not preclude their consideration of mitigating evidence. If they had correctly understood that they could consider mitigating evidence in determining the sentence, they would not have asked the question at all.

The jurors asked specifically – yes or no – whether they had a duty to impose a death sentence based on aggravation alone. They were denied the clarification that

---

[10] The complete sentencing instruction was only one page. (J.A. at 192-93.) It is not as though the portion at issue was buried in a long document.

they sought and the easy, straightforward answer that their question called for. Instead, they were told to reread the instructions they had failed to fathom.

"Presentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence." *Boyde*, 494 U.S. at 384. On this record, where the jurors' question to the court revealed that they did *not* "feel entitled to consider that evidence" without further confirmation by the judge, and where they were refused such confirmation, it will not do to say that, as a matter of law, the instructions really were unmistakably clear all along. To do so is to tolerate a constitutionally unacceptable risk that the mitigation evidence presented on Mr. Weeks' behalf was not "within 'the effective reach of the sentencer.' " *Johnson v. Texas*, 509 U.S. 350, 367 (1993). Only a new sentencing hearing for Mr. Weeks can allay that risk.

ARGUMENT

This Court has repeated time and again that the "qualitative difference" between a death sentence and lesser sentences, together with "the fundamental respect for humanity underlying the Eighth Amendment," imposes a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976); *see also Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Johnson v. Mississippi*, 486 U.S. 578, 584-85 (1988). Such a determination must take account both of the nature of the crime and of the nature of the defendant –

of "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson*, 428 U.S. at 304.

As a corollary principle, the Eighth Amendment " 'requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' " *Lockett*, 438 U.S. at 604 (quoting *Woodson*, 428 U.S. at 304); *see also, e.g., Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (citations omitted) ("[F]ull consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response to the defendant's background, character, and crime.' "); *California v. Brown*, 479 U.S. 538, 541 (1987) ("constitutionally indispensable"). Failure to consider the mitigating circumstances of a capital offender's individual case creates the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," a risk that is "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett*, 438 U.S. at 605.

Consequently – and again the Court has repeatedly held – capital sentencers cannot be precluded from considering relevant mitigating evidence, *e.g., Mills v. Maryland*, 486 U.S. 367, 374-375 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 438 (1990), and cannot refuse to consider such evidence in the belief that they are precluded from doing so, *Eddings*, 455 U.S. at 114-15. No Eighth Amendment principle is more firmly established than this one. *See, e.g., Buchanan*, 118 S. Ct. at 761 ("[T]he sentencer . . . may not refuse to consider [ ] any constitutionally

relevant mitigating evidence."); *Harris v. Alabama*, 513 U.S. 504, 511 (1995) ("Consistent with established constitutional law, Alabama has chosen to guide the sentencing decision by requiring the jury and judge to weigh aggravating and mitigating circumstances."); *Morgan v. Illinois*, 504 U.S. 719, 736-37 (1992) (Illinois law requiring the sentencer to consider all relevant mitigating evidence is "consistent with the requirements concerning mitigating evidence described in this Court's cases."); *Parker v. Dugger*, 498 U.S. 308, 315 (1991) ("Under both federal and Florida law, the trial judge could not refuse to consider any mitigating evidence."); *Saffle v. Parks*, 494 U.S. 484, 489 (1990) (citation omitted) (" 'neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence' "); *Burger v. Kemp*, 483 U.S. 776, 789 n.7 (1987) ("We have no doubt that this potential testimony would have been relevant mitigating evidence that the sentencer could not have refused to consider"); *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987) (citation omitted) ("We have held that in capital cases, 'the sentencer may not refuse to consider . . . any relevant mitigating evidence.' "); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (citation omitted) ("Equally clear is the corollary rule that the sentencer may not refuse to consider . . . 'any relevant mitigating evidence.' "); *Eddings*, 455 U.S. at 113-114 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. . . . [Sentencers] determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.")

For this reason this Court has repeatedly reversed death sentences imposed on a record that created genuine doubt that the sentencer had understood its right and responsibility to consider mitigating circumstances as well as aggravating ones. *Eddings*; *Hitchcock*; *Parker*; *see also Clemons v. Mississippi*, 494 U.S. 738, 752 (1990) (vacating the affirmance of Clemons' death sentence and explaining that "because the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented . . . to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence"). "*Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity," *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring), as to whether a sentencer understood its duty to "consider[,] and [its ability to] give effect to" such mitigating evidence. *Penry*, 492 U.S. at 319. If there is a "reasonable likelihood" that a capital sentencer applied "the challenged instructions in a way that prevent[ed] the consideration of constitutionally relevant [*i.e*, mitigating] evidence," *Boyde*, 494 U.S. at 380, then the Eighth and Fourteenth Amendments are violated. *See Calderon v. Coleman*, 525 U.S. 141 (1998); *see also Estelle v. McGuire*, 502 U.S. 62, 74-75 (1991); *Mills*, 486 U.S. at 374-375; *Hitchcock*, 481 U.S. at 398-399.

The jurors in Mr. Weeks' case candidly advised the trial court that they were confused as to whether, if they found aggravation, they were duty-bound to impose a death sentence *without* considering mitigation or, on the other hand, were then supposed to consider mitigation. This was a jury that had been specifically told to request

further instruction from the judge if it did not fully understand the meaning of any of the instructions that it had been given. (J.A. at 24-25, 31, 40, 46, 54, 62.) After deliberating on the sentence for several hours, the jurors asked:

> If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? or must we decide (even though he is guilty of 1 of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify.

(J.A. at 217) (emphases in original.) Unmistakably, then, the jurors (or at least some of them) believed – despite the instructions they had received and which were facially sufficient under *Buchanan* – that they might have a *duty* to disregard mitigation if the state proved aggravation.

Of course, as *Buchanan* plainly recognized, there is no "duty as a jury to issue the death penalty" upon finding aggravation. Under both Virginia law and the Eighth and Fourteenth Amendments, the "duty as a jury" upon finding aggravation is to consider mitigation. "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of other factors to determine whether or not death is the appropriate punishment." *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (citing *California v. Ramos*, 463 U.S. 992, 1008 (1983).)

But Mr. Weeks' jurors did not understand this, and so they asked: "What is the rule? Please clarify." Instead of clarifying – a simple enough task, since the jury itself had

posed its question in straightforward either/or terms – the trial judge persisted in directing the jurors back to the very same jury instruction which they had just reported that they did not understand and which, under one of the two alternative readings that they posed for the court's resolution, unconstitutionally forbade them to consider mitigation. Mr. Weeks' jurors then retired to resume their task and returned after two hours with a tear-filled pronouncement of a sentence of death.

Under these circumstances, the very *least* that can be said is that "there is a reasonable likelihood" (*Estelle*; *Boyde*) that the sentencers did not consider the evidence that was offered in mitigation.[11] Given the jurors' question, and the court's non-response, "[t]he possibility that petitioner's jury conducted its task improperly certainly is great enough to require re-sentencing." *Mills*, 486 U.S. at 384. The "reasonable likelihood" test of *Boyde* must mean at least this much. If relief is required when jurors are silent about their probably unconstitutional understandings, *see Mills*, 486 U.S. at 381 (relief granted despite "no extrinsic evidence of what the jury . . . actually thought"); *Penry*, 492 U.S. at 326 ("[A] reasonable juror could well have believed [although none said so] that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence"), then, *a fortiori*, relief is required when they say explicitly that they are entertaining an

---

[11] The Virginia Supreme Court's summary denial of relief on this claim was contrary to the controlling *Lockett* and *Boyde* veins of this Court's "consideration of mitigation" jurisprudence, and was unreasonable. *See* note 9 *supra*.

unconstitutional understanding and want to be advised whether it is right or wrong.[12]

The judge at Mr. Weeks' trial was handed a simple right-or-wrong question. What the question *said* was that the sentencing jurors were harboring a misapprehension of the governing law, which, if not corrected, would produce an unconstitutional death-sentencing process. What the question *asked* was easily answered. But the judge refused to answer the question except by referring the jurors to the original sentencing instructions which, after hours of deliberation, they had found insufficient to provide an answer. This was unjustifiable. "[W]henever there is a reasonable likelihood that a juror will misunderstand a sentencing term [as here], a defendant may demand instruction on its meaning [as here], and a death sentence following the refusal of such a request should be vacated as having been 'arbi rarily or capriciously' and 'wantonly and . . . freakishly imposed.' " *Simmons*, 512 U.S. at 172-73 (Souter, J., concurring) (citation omitted). And when a jury "makes explicit its difficulties [as here]

---

[12] *Cf. Simmons v. South Carolina*, 512 U.S. 154, 170, n.10 (1994) ("It almost goes without saying that if the jury in this case understood . . . the 'plain meaning' [of the terms in the instruction], there would have been no reason for the jury to inquire [as to their meaning]"); *id.* at 173 (Souter, J., concurring) ("It is . . . clear that at least one of these particular jurors did not understand the meaning of the term, since the jury sent a note to the judge asking [the court to define the term]."); *id.* at 178 (O'Connor, J., concurring) ("[T]hat the jury in this case felt compelled to ask" about the meaning of the terms in the instruction "shows that the jurors did not know" what the terms meant.).

a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946). Simply telling the jury to go back and read the instruction again does not remove the "reasonable likelihood that [Mr. Weeks'] jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character." *Boyde*, 494 U.S. at 381.[13]

The Fourth Circuit held otherwise because it apparently believed that *Buchanan* had decreed a rule of destiny about human understanding rather than a rule of law about the facial sufficiency of Virginia's pattern jury instructions. In the Fourth Circuit's view, a Virginia capital sentencing jury *cannot* fail to comprehend – and therefore cannot unconstitutionally interpret – the instructions

---

[13] Virginia asserted in its Brief in Opposition that Mr. Weeks' claim calls for this Court to establish a "new rule" under *"Teague* and its progeny." (Br. in Opp'n at 12.) The crux of this *Teague* argument appears to be that because the instructions and circumstances of Mr. Weeks' trial were similar to those later considered by this Court in *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757 (1998), only a "new rule" would entitle Mr. Weeks to relief. But Mr. Weeks seeks only the obvious application of the pedestrian rule that the sentencer in a capital trial may not deem itself precluded from considering relevant mitigating evidence. This Court's approval of Virginia's pattern capital sentencing instructions in *Buchanan* did not involve the situation in which those instructions failed in a particular case to get across to the jury that it has no "duty as a jury" to disregard mitigation if it finds an aggravating factor. *Compare Jurek v. Texas*, 428 U.S. 262 (1976) (Texas statute constitutional) *with Penry*, 492 U.S. at 315 (claim that assurances of *Lockett* and *Eddings* were not fulfilled under particular circumstances of Penry's Texas case not a "new rule" under *Teague*).

held facially acceptable in *Buchanan*, even when the jurors confess their incomprehension. (J.A. at 345.) This "we won't hear of it" approach blinks reality.[14]

---

[14] Other courts have been less unworldly. *See United States v. Nunez*, 889 F.2d 1564, 1568-1569 (6th Cir. 1989) (abuse of discretion to refer jurors back to instructions that had already caused confusion); *United States v. Zimmermann*, 943 F.2d 1204, 1213-1214 (10th Cir. 1991) (plain error to fail to provide additional instructions in response to jury's questions). In *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 1575 (1998), the jury was given technically flawless instructions regarding the process for determining whether the defendant should be sentenced to death. During the penalty phase deliberations, McDowell's jury sent out a note revealing confusion and disagreement about whether it was permitted to consider the mitigating evidence presented by the defense. *Id.* at 835. McDowell's trial court did not directly answer the jurors' questions; it merely referred the jurors back to the original instructions. The en banc court in *McDowell* acknowledged this Court's consistent refusal to tolerate any barrier to the sentencer's consideration of mitigating evidence, then concluded:

> The jury's mistake and confusion in the instant case communicated to the judge in its note fit squarely within the teaching of *Lockett* and *Eddings*. Although the jurors had been properly instructed, the understanding of eleven of them – shades of *Eddings* – was "as if the trial judge had instructed [them] to disregard the mitigating evidence [McDowell] proffered on his behalf."

Id. at 837 (citations omitted). Referring to the trial court's direction of the jurors back to the original instruction, the *McDowell* court recognized that when a jury has failed to understand the instructions in the first instance, "it would be folly to presume . . . that in the end they got it right and followed the law." *Id.* at 839.

Buchanan is about what *should* happen, not what *will*. *Buchanan* is not the first time this Court has approved a capital sentencing procedure as facially sufficient, then has had to correct misapplications of the procedures. *Compare Gregg v. Georgia*, 428 U.S. 153 (1976), *with Godfrey v. Georgia*, 446 U.S. 420 (1980); *compare Proffit v. Florida*, 428 U.S. 242 (1976), *with Parker, supra*; and *compare Jurek, supra, with Penry, supra* (*see* note 13 *supra*). The Court's rule that controls Lonnie Weeks' case in mitigation is not *Buchanan*; it is that

> [u]nder our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio, supra*; *Hitchcock v. Dugger* . . . ; by the sentencing court, *Eddings v. Oklahoma, supra*; or by an evidentiary ruling, *Skipper v. South Carolina, supra*. . . . *Whatever the cause* . . . the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for re-sentencing." *Eddings v. Oklahoma*, 455 U.S. at 117 (O'Connor, J., concurring).

Mills, 486 U.S. at 375 (emphasis added).

Whatever the cause, there is more than a reasonable likelihood that Mr. Weeks' jurors did not consider his substantial evidence in mitigation. The lower court's duty was to set aside his death sentence and permit re-sentencing.

CONCLUSION

This Court should reverse the decision of the court of appeals and remand with directions to vacate Mr. Weeks's sentence of death.

Respectfully submitted,

GLEN A. HUFF, ESQ.
TIMOTHY M. RICHARDSON, ESQ.
Counsel of Record
HUFF, POOLE & MAHONEY, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
(757) 499-1841

STERLING H. WEAVER, SR., ESQ.
P.O. Box 543
Portsmouth, VA 23705
(757) 393-0237

MARK EVAN OLIVE, ESQ.
LAW OFFICES OF
MARK E. OLIVE, P.A.
320 West Jefferson Street
Tallahassee, FL 32301
(850) 224-0004

Counsel for Petitioner

(7)

No. 99-5746

FILED
OCT 13 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX
VOLUME I, PAGES 1 TO 188

ROBERT H. ANDERSON, III, ESQ.
Assistant Attorney General
Counsel of Record
Supreme Court Building
101 North Eighth Street
Richmond, VA 23219
(804) 786-4624

Counsel for Respondent

GLEN A. HUFF, ESQ.
TIMOTHY M. RICHARDSON, ESQ.
Counsel of Record
HUFF, POOLE & MAHONEY, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
(757) 499-1841

STERLING H. WEAVER, SR., ESQ.
P.O. Box 543
Portsmouth, VA 23705
(757) 393-0237

MARK EVAN OLIVE, ESQ.
LAW OFFICES OF MARK E. OLIVE, P.A.
320 West Jefferson Street
Tallahassee, FL 32301
(850) 224-0004

Counsel for Petitioner

Petition For Writ Of Certiorari Filed On August 16, 1999
Certiorari Granted On September 1, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

193P

TABLE OF CONTENTS

Page

Volume I

Lower Court Docket Entries 1

Defendant's Proposed Voir Dire Questions filed 10/8/93..... 9

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/15/93..... 13

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/18/93..... 17

Defense Exhibit B filed 10/18/93 66

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/20/93 Testimony of Luther J. Waddell..... 72

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/20/93..... 80

Guilt Phase Verdict Form Filed 10/21/93 84

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/21/93..... 85

Testimony of M. W. Casey..... 89

Testimony of Ralph Marshall 94

Testimony of Jeanette A. Galbraith..... 97

Testimony of Douglas Buchanan 100

Testimony of Linda Cavazos..... 102

Testimony of Lonnie Weeks, Jr..... 104

Testimony of Bennie House..... 130

Testimony of Tony McBride..... 136

TABLE OF CONTENTS – Continued

Page

Testimony of Sean Beaman 139

Testimony of Renee Rogers 142

Testimony of Juaneza Vivian 145

Testimony of Olden Bryant 151

Testimony of Trina Hammond 156

Testimony of Donny M. Dees 162

Testimony of Evelyn Leach 166

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/21/93 Testimony of Lonnie Weeks, Jr. 182

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/22/93 184

Volume II

Instruction No. B1-Denied 189

Instruction No. C1-Denied 190

Instruction No. 1-Granted 191

Instruction No. 2-Granted 192

Instruction No. 3-Granted 194

Instruction No. B1-Granted 195

Sentencing Verdict Forms 196

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/22/93 199

Jury Questions filed 10/22/93 217

TABLE OF CONTENTS – Continued

Page

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/22/93 218

Sentencing Verdict Form filed 10/22/93 228

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 1/13/94 229

Assignments of Error and Designation of Record filed in the Supreme Court of Virginia 232

Motion to Exceed Page Limit for Brief filed in the Supreme Court of Virginia on May 11, 1994 240

Brief Filed with the Supreme Court of Virginia in Non-Compliance with Page Limit on May 11, 1994 242

Order from the Supreme Court of Virginia Denying Motion to Exceed Page Limit for Brief entered May 27, 1994 247

Assignments of Error and Questions Presented from the Brief Filed with the Supreme Court of Virginia in Compliance with Page Limit 248

Statement of Facts From Brief Filed with the Supreme Court of Virginia in Compliance with Page Limit ... 265

Principles of Law, Argument, and Authorities From Brief Filed with the Supreme Court of Virginia in Compliance with Page Limit 267

Weeks v. Commonwealth, 450 S.E.2d 379 (1994) 272

Petition for Writ of Habeas Corpus filed in United States District Court for the Eastern District of Virginia on 2/7/97 297

Brief of Appellant filed in United States Court of Appeals for the Fourth Circuit on 10/13/98 304

TABLE OF CONTENTS – Continued

Page

Appellant's Reply Brief filed in United States Court of Appeals for the Fourth Circuit on 12/17/98... 315

Motion to Recall Mandate filed in United States Court of Appeals for the Fourth Circuit on 7/22/99..... 323

Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999) 327

Order From United States Supreme Court Granting Leave to Proceed In Forma Pauperis..... 378

General Docket
Fourth Circuit Court of Appeals

98-21 98-21

Court of Appeals Docket #: 98-21 Filed: 7/21/98
Nsuit: 0
Weeks v. Angelone

Appeal from: Eastern District of Virginia at Norfolk

Lower court information:

District: 0422-2 : CA-96-829-2
Presiding Judge: Rebecca B. Smith, District Judge
Court Reporter: Sue Ash, Official Court Reporter
Court Reporter: Horace P. Weiss, Official Court Reporter
Court Reporter: John Cox, Court Reporter Coordinator
Date Filed: 8/14/96
Date order/judgment: 6/19/98
Date NOA filed: 7/17/98
District: 0422-2 :
Date Filed: **/**/**
Date order/judgment: 4/1/98
Date NOA filed: **/**/**

Fee status: Criminal Justice Act

Prior Cases:
None
Current Cases:
None

LONNIE WEEKS, JR.
Petitioner – Appellant

v.

RONALD J. ANGELONE,
Director of the Virginia
Department of Corrections
Respondent – Appellee

Sterling Harrisbe Weaver, Sr.
757-393-0237
[COR NTC CJA]
615 Dinwiddie Street
P. O. Box 543
Portsmouth, VA 23705

Glen Alton Huff
757-499-1841
Suite 100
[COR NTC CJA]
Timothy Meade Richardson
757-499-1841
Suite 100
[COR NTC RPB]
HUFF, POOLE &
MAHONEY, PC
4705 Columbus Street
Virginia Beach, VA
23462-6749

Robert Edward Lee, Jr.
804-643-6845
Suite 510
[COR NTC RCA]
VIRGINIA CAPITAL
REPRESENTATION
RESOURCE CENTER
1001 East Main Street
P. O. Box 506
Richmond, VA 23204-0506
Robert H. Anderson, III
804-786-4624
[COR NTC GVT]
OFFICE OF THE
ATTORNEY GENERAL OF
VIRGINIA
900 East Main Street
Richmond, VA 23219

LONNIE WEEKS, JR.

Petitioner – Appellant

v.

RONALD J. ANGELONE, Director of the Virginia Department of Corrections

Respondent – Appellee

7/21/98	Death Penalty case docketed. (beth)
7/21/98	CLERK ORDER FILED appointing Sterling Harrisbe Weaver, Jr. as lead CJA counsel and Glen Alton Huff as CJA co-counsel for Appellant Lonnie Weeks [2810014-1]. Nunc Pro Tunc Date: 7/17/98. Copies to all counsel. [98-21] (beth)
7/21/98	Docketing notice issued. [98-21] (beth)
7/24/98	Counsel of record form filed by Robert Edward Lee for Appellant Lonnie Weeks. (beth)
7/24/98	Counsel of record form filed by Robert H. Anderson for Appellee Ronald J. Angelone. (beth)
7/31/98	Docketing statement filed by Appellant Lonnie Weeks [2818251-1]. T/S needed?: Y. T/S already on file?: N. [98-21] (beth)
7/31/98	Transcript order filed for Horace P. Weiss. [98-21] (beth)
7/31/98	Counsel of record form filed by Glen Alton Huff, Timothy Meade Richardson for Appellant Lonnie Weeks. (beth)
8/3/98	Transcript order acknowledgement filed. Transcript due on 9/9/98 for Horace P.

Weiss. T/S certification due on 9/9/98 for Horace P. Weiss. [98-21] (beth)

9/3/98 Disciplinary proceedings notice issued to Sterling Harrisbe Weaver for Appellant Lonnie Weeks for COR default. [98-21] Document due by 9/18/98. (beth)

9/3/98 Certification transcript filed in district court by Horace P. Weiss on 8/27/98. [98-21]. (beth)

9/3/98 Briefing order filed. [98-21] Appellant(s) brief/joint appendix due 10/13/98 for Lonnie Weeks. (beth)

9/9/98 Counsel of record form filed by Sterling Harrisbe Weaver for Appellant Lonnie Weeks. (beth)

9/14/98 Certification of ROA complete and retained in the District Court. [98-21] (beth)

10/5/98 Motion (unopposed) filed by Appellant Lonnie Weeks to file oversize appendix of 2,160 pages [2857264-1]. [98-21] (beth)

10/5/98 CLERK ORDER FILED granting motion to file oversize appendix of 2,160 pages. [2857264-1] Copies to all counsel. [98-21] (beth)

10/13/98 Brief joint appendix filed by Appellant Lonnie Weeks. Type of Service: CD Copies of brief: 6 # brf pages: 53 Copies of apx: 5 of Vols. 1-5 # apx pages: 2,118 Sufficient? [Y/N]: Y 2-sided copying: Y SEALED? [Y/N]: N [98-21] Appellee brief due 11/12/98 for Ronald J. Angelone. (beth)

10/16/98 Motion filed by Appellant Lonnie Weeks for certificate of appealability [2864565-1]. [98-21] (beth)

10/16/98 CLERK ORDER FILED calendaring case for oral argument on Monday, January 25, 1999, in Richmond, Virginia. [2864566-1]. Copies to all counsel. [98-21] (beth)

10/29/98 Motion (unopposed) filed by Appellant Lonnie Weeks to extend time to file appellee(s) brief until 11/30/98 [2873373-1]. [98-21] (beth)

10/30/98 Record on appeal filed. Pleadings: Vols. 1-3 Transcript: Vol. 4. State Court Records: Vols. 5-63 No. of boxes: 4. [98-21] (ldj)

11/3/98 Case calendared for oral argument. [98-21] (jc)

11/4/98 COURT ORDER filed granting motion to extend time to file e's br [2873373-1] Appellee(s) brief now due 11/30/98 for Ronald J. Angelone. Copies to all counsel. [98-21] (beth)

11/13/98 CLERK ORDER FILED continuing oral argument. [2881640-1]. Argument continued until the week of March 1 through March 5, 1998. Copies to all counsel. [98-21] (beth)

11/19/98 Criminal Justice Act 31 voucher issued to Lawyers Printing & Research. D06786. [98-21] (ff)

12/1/98 Brief filed by Appellee Ronald J. Angelone. Type of Service: PM Copies: 8 # brf pages: 50. Sufficient [Y/N]: Y. SEALED?. N. [98-21] (beth)

12/11/98	Supplemental authorities (FRAP 28(j)) filed by Appellant Lonnie Weeks [2898289-1]. [98-21] (beth)
12/17/98	Reply brief filed by Appellant Lonnie Weeks. Type of Service: PM Copies of brief: 6 # brf pages: 29. Sufficient [Y/N]: Y. Sealed? N. [98-21] (beth)
12/17/98	Criminal Justice Act 31 voucher filed by Lawyers Printing & Research. Voucher #: D06786. [98-21] (ff)
12/18/98	Case tentatively calendared for oral argument Place: Richmond. SUBMISSION DEADLINE: December 28, 1998. (jle)
1/4/99	Case calendared for oral argument. [98-21] (jc)
2/25/99	Supplemental authorities (FRAP 28(j)) filed by Appellee Ronald J. Angelone [2940508-1]. [98-21] (beth)
3/1/99	Oral argument heard. Robert H. Anderson for Appellee Ronald J. Angelone, Timothy Meade Richardson for Appellant Lonnie Weeks Courtroom Deputy: JPH. [98-21] (jph)
5/10/99	Published, authored opinion filed. [98-21] (beth)
5/10/99	Certificate of appealability denied by the Fourth Circuit. [98-21] (beth)
5/10/99	Opinion ruling denying motion for CAP [2864565-1]. [98-21] (beth)
5/10/99	Judgment order filed. Decision: Certificate of Appealability Denied – Appeal Dismissed. [98-21] (beth)

5/10/99	Criminal Justice Act 30 voucher # D64999 issued to Sterling Harrisbe Weaver. [98-21] (beth)
5/10/99	Criminal Justice Act 30 voucher #D65000 issued to Glen Alton Huff. [98-21] (beth)
5/24/99	Petition filed by Appellant Lonnie Weeks for rehearing. Number copies filed: 20 [2992016-1]., for rehearing en banc. Number of copies filed: 20 [2992016-2] [98-21] (beth)
6/4/99	COURT ORDER filed denying motion for rehearing [2992016-1] EOD Date: 6/4/99., denying motion for rehearing en banc [2992016-2] EOD Date: 6/4/99. Copies to all counsel. [98-21] (ldj)
6/14/99	Mandate issued. [98-21] (beth)
6/15/99	Record on appeal returned to USDC at Norfolk. Pleadings: Vols. 1 – 3 T/S: Vol. 4 State Court Records: Vols. 5 – 63 No. of boxes: 4 [98-21] (ejm)
6/16/99	SUPPLEMENTAL Criminal Justice Act 30 voucher # D65000 issued to Glen Alton Huff. [98-21] (beth)
6/16/99	SUPPLEMENTAL Criminal Justice Act 30 voucher # D64999 issued to Sterling Harrisbe Weaver. [98-21] (beth)
7/22/99	Response/answer filed [3026170-1] by Appellee Ronald J. Angelone to motion to recall the mandate [3026073-1], motion to stay execution of sentence [3026073-2] [98-21] (dhb)
7/23/99	Motion filed by Appellant Lonnie Weeks to recall the mandate for consideration of stay

request [3026073-1]; to stay execution of sentence [3026073-2]. [98-21] (dhb)

8/3/99 COURT ORDER filed denying motion to recall the mandate [3026073-1], denying motion to stay execution of sentence [3026073-2] Copies to all counsel. [98-21] (beth)

8/20/99 Supreme Court notice that petition for certiorari was filed on 08/16/99. Spct No.: 99-5746 Spct Pty 1: Lonnie Weeks, Jr. Spct Pty 2: Ronald J. Angelone, Dir., VDOC. [98-21] (cw)

8/24/99 CJA deadline(s) created/updated. [98-21] Follow-up due 9/7/99 for Timothy Meade Richardson (beth)

8/31/99 DUPLICATE Criminal Justices Act 30 voucher # D56000 issued to Glen Alton Huff. [98-21] (beth)

8/31/99 CJA deadline(s) created/updated. [98-21] Follow-up due 9/14/99 for Timothy Meade Richardson (beth)

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

* * *

PRINCE WILLIAM COUNTY CIRCUIT COURT

shows a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation, could adequately be punished by a sentence less than death?

9. Do you believe a person, who in the act of murdering someone shows a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation, could adequately be prevented from seriously endangering society by a sentence less than death?

10. Do you believe a person, who in the act of murdering someone commits a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder, could be rehabilitated?

11. Do you believe a person, who in the act of murdering someone commits a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder, could adequately be punished by a sentence less than death?

12. Do you believe a person, who in the act of murdering someone commits a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder, could adequately be prevented from seriously endangering society by a sentence less than death?

13. Do you promise to seek further instruction from the judge if you do not fully understand the meaning of any of the instructions he gives you?

14. Do you promise to seek further instruction from the judge if there is a disagreement among jurors as to the meaning of any of the instructions the judge gives you?

15. Were the school or schools you attended racially integrated?

16. Do you approve of intermarriage between races?

17. Do you believe in affirmative action?

18. Do you belong to any social clubs or other organizations which have members of racial or ethnic minorities?

19. If so, which minorities?

20. Does the church where you worship have any members of racial or ethnic minorities?

21. If so, which racial or ethnic minorities?

22. Do you send your children to public or private schools?

23. Why?

24. If you [sic] child attends private school, does that school have students who are of racial or ethnic minorities?

25. If so, which minorities?

27. Would you approve of a member of your family marrying a person of your race?

28. Would you approve of a member of your family marrying a person of a different race?

29. Do you believe that persons of African descent are more likely to commit crimes than persons of other races?

30. Exactly what work do you do in your employment?

31. What formal education have you had?

32. If you went to college, what was your major?

33. Do you have any hobbies or other leisure activities?

34. If so, what are they?

35. Do you have any children?

36. Are you familiar with firearms?

37. Do you own any firearms?

38. Do you hunt or shoot for recreation?

39. Do you belong to any gun clubs or similar organizations?

40. Have you ever done anything under fear or stress which you later regretted doing?

41. Do you believe that a person can commit an act in fear and panic which is out of character for him or her?

42. Are you now or have you ever been in the military service?

43. Do you have any religious convictions which either support or disapprove of the death penalty?

44. If so, please describe the conviction or convictions.

44[A]. Do you believe that if the defendant were sentenced to ~~death~~ [life] he would spend the remainder of his life in prison?

45. Do you believe that if the defendant is sentenced to death that the sentence will be carried out?

46. Do you believe that young people generally act more impulsively than older people?

47. Could you consider a defendant's youth as a factor which might justify a sentence less than death?

48. Could you consider a defendant's loss of a father or mother at a young age as a factor which might justify a sentence less than death?

49. Could you consider a defendant's remorse as a factor which

* * *

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

* * *

[172] It probably depends on what the evidence is. If that person has five or six previous felony convictions, maybe they wouldn't.

On the other hand, if that person has never had a run in, at all, with the law, maybe they would.

There is just no factual basis. And the questions are just wide open and left to be argumentative.

The Court will deny, then, one through twelve, for the reasons as I have indicated.

MR. MORISSETTE: Please note my objection, Your Honor, based on the Fifth, Sixth, Eighth and Fourteenth Amendments –

THE COURT: It will be so noted.

MR. MORISSETTE: – to the Constitution of the United States, Your Honor.

THE COURT: We will start then with thirteen.

MR. WILLETT: Your Honor, we object to that, because we think it may be misleading to the Jury and give them a false impression.

'Do you promise to seek further instructions from the Judge if you do not fully understand the meaning of any of the instructions he gives you?'

Well, Your Honor may not be able to give

* * *

[174] we've said in questions one through twelve.

And that Jurors will have a hard time understanding those things. And we don't want to be in a situation where a Jury is back there discussing things, and they feel like they need to determine what the legal meaning of the instructions is.

Yes; they can make certain factual findings. But they should seek further guidance from the Court if the meaning of the instructions is not clear to them or a disagreement arises.

The Defendant, again, has the right to have the Jury properly instructed on the law. This is just a question to make sure the Jurors that are eventually empaneled understand that they do have the right to seek further guidance from the Court on issues of the instructions given by the Court.

THE COURT: All right, sir; I'll grant thirteen. Let's go to fourteen.

MR. WILLETT: Judge, I would have the same objection with respect to fourteen, and an additional one. Because it talks about disagreement among the Jurors.

And I think it's improper for counsel to ask a [175] question that invites disagreement among the Jurors, citing Pruitt versus Commonwealth. And I object to it for that reason.

THE COURT: Do you wish to respond, sir?

MR. MORISSETTE: It's, basically, the same argument, Your Honor. It's stated in a hypothetical, not –

if I had used the word, 'when there is disagreement', I think, that suggests that there's going to be disagreement.

This just says, 'if'.

THE COURT: Well, I'm going to deny fourteen. I think thirteen covers it. Because thirteen tells them, if they do not fully understand.

If they understand, there's not going to be any disagreement. If you have disagreement, that means they're not going to understand.

And I think we're just, again, it covers the same thing. I think, if they have a problem with an instruction, we've told them to come for further instructions.

And I think that's sufficient.

Fifteen, sir

MR. WILLETT: Your Honor, fifteen through

* * *

[214] that they can enter the jury box with an open mind and wait until the entire case is presented, before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused.

I think that is the standard question to be asked.

MR. BAKER: Well, Your Honor, again, we have a difference of opinion here. I believe that I am entitled to find out whether the Jurors have, in fact, an opinion as to the Defendant's guilt.

THE COURT: Well, that, I'm giving you, counsel. That's not the issue. You want to then find out what is their opinion.

If I understand it, that's what your question says.

MR. BAKER: No.

THE COURT: 'If so, what is that opinion?' I've granted you your number fifty-seven. Number fifty-eight is, what is the opinion.

MR. BAKER: You granted fifty-six, Your Honor?

THE COURT: I beg your pardon?

MR. BAKER: You granted fifty-six and fifty-seven, correct?

• • •

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

• • •

[42] an offense punishable with death?

JURY PANEL: (Indicating in the negative.)

THE COURT: Is there any juror among you who could never vote to impose the death penalty or who would refuse even to consider its imposition in this case?

JURY PANEL: (Indicating in the negative.)

THE COURT: If you were to sit as a juror in this case and the jury were to convict the Defendant of capital murder, would you be able to consider voting for a sentence less than death in this matter?

MS. NELSON: Yes.

THE COURT: Would the other jurors be able to consider some sentence less than death, even though there had been a conviction of capital murder? Have I confused you in the question?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: I'm sorry. First I've asked you whether or not – I asked you was there any juror among you who would never be able to impose the death penalty or who would refuse even to consider it, and you've told me that you would consider it and that you could impose it.

Now I'm asking you the reverse question. Could you consider the imposition of a life sentence as [43] opposed

to the death penalty, even though you may have convicted the Defendant of capital murder? Could you consider life as well as death?

MR. LETSON: You said if circumstances warrant it?

THE COURT: That's correct, sir. You could consider it?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do each of you understand that the Commonwealth must prove the Defendant's guilt beyond a reasonable doubt?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do each of you understand that the Defendant is not required to produce evidence? Each of you understand that, that he is not required to produce any evidence in this matter; the burden is on the Commonwealth. You understand that?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do you know of any reason whatsoever why you could not sit and give a fair and impartial trial to the Commonwealth and to the accused, based solely on the law which I will give you and the evidence that you will hear and see in this courtroom?

* * *

[46] MR. EBERT: In the trial we have what we call a bifurcated proceeding. It means that you will hear evidence as to whether or not the Defendant is guilty or innocent. If you find that the Defendant is guilty, then

you would come back and hear more evidence and determine whether or not you feel the death penalty is appropriate. Do you understand that?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Will you be willing to consider all the evidence of both aspects of this trial proceeding?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: If you find the Defendant guilty, you must find him guilty beyond a reasonable doubt. Do you understand that?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: And because this is a capital case the burden is the same in this case as it is in any other case, no more or no less; it must be guilty beyond a reasonable doubt. Do you understand that?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: I think the Court has asked you this, but I'm going to ask you. Do any of you have any moral, ethical or religious scruples or personal beliefs [47] against capital punishment?

JURY PANEL: (Indicating in the negative.)

MR. EBERT: I think you've answered this likewise, but if the Defendant were to be convicted there would be two options under the law to which he could be sentenced. One, of course, would be the death penalty and the other would be life imprisonment. Could you fully consider both of those options?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: It would depend upon the evidence and the circumstances and the law as to what penalty you impose; is that correct?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: And none of you would automatically vote against the death penalty; is that correct?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Is there anyone who has any personal beliefs that would impair your performance as a juror in this case, even though you could impose either option? Any reason that you might have which would impair you to be fully fair and impartial to both the Commonwealth and the accused?

* * *

[59] The next question, if you were to convict the Defendant of the capital murder as charged, would you automatically vote for the death penalty?

MR. SCHREIBER: It depends on the circumstances of the whole case.

MS. NELSON: Correct, and the directions from the Judge.

MR. LETSON: No. It would depend on the circumstances.

MR. BAKER: Do you believe that younger people generally act more impulsively than older people?

MS. NELSON: No.

MR. FUDD: Yes.

MR. BAKER: I've got a no from Ms. Nelson and I've got a yes from Mr. Schreiber and Mr. Fudd and Mr. Letson.

MR. LETSON: I'm undecided. That's difficult for me to answer.

MR. BAKER: Could you consider a Defendant's youth as a factor in mitigation in determining a sentence in this matter? I'll restate the question.

Could you consider the fact that the Defendant is a young man as a factor in mitigation? Mitigating [60] means that somebody – it makes the offense less. The factor, as you say, concerning the circumstances that you all said you would consider. Could you consider his youth as one of those circumstances? Have I totally lost everybody?

MR. LETSON: I understand the question, but I'd say no.

MR. FUDD: I'd say no.

MR. BAKER: You couldn't consider that?

MR. LETSON: No, sir. I'm not sure – are we told how old he is?

MR. BAKER: Yes, sir.

Could you consider the Defendant's loss of a father or a mother at a young age as a factor in mitigation? Mitigation means something to lessen the punishment.

MS. NELSON: They're difficult to answer out of context.

MR. BAKER: I understand that. The answer is no, or no one can answer that question?

MR. LETSON: It would be difficult to answer.

MR. BAKER: You could consider all the facts and circumstances.

* * *

[75] you may have already stated?

JURY PANEL: (No response.)

THE COURT: Mr. Ebert?

MR. EBERT: Good morning. As the Court told you, I'm Paul Ebert. Mr. Willett and I are here on behalf of the Commonwealth and Mr. Baker and Mr. Morissette are here on behalf of the Defendant. All of us appreciate you coming here today and giving up your valuable time.

You all understand that this is a capital offense which carries a potential death penalty, do you not?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: And you understand, or maybe you don't, we have what we call a bifurcated proceeding. That means you would hear evidence of guilt or innocence, and if you determined, in fact, that the Defendant was guilty, then you would have a further proceeding to determine what would be the appropriate punishment. Do you understand that?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Will all of you be willing to consider all the evidence to be presented in both stages of the trial, assuming we have two stages?

[76] JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: You understand, as the Court has told you, you must find the Defendant beyond a reasonable doubt? Do you understand that's the same burden in this case as it is in any criminal case, and the fact that this is a capital murder case, would you require any more than you would in any other criminal case?

JURY PANEL: (No response.)

MR. EBERT: Would you answer that in the affirmative or do you understand the burden is the same in this case in any case? Do you understand that?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: I think two of you have indicated you don't feel you could impose the death penalty. Would that be based on religious scruples or personal beliefs?

MR. CORNWELL: I think God only can give life and take life myself.

MR. EBERT: I'll ask this question to the two of you. If the Defendant were to be convicted, there are two possible verdicts you could return. One would be the death penalty and the other would be life imprisonment. Could you consider both of those options and base your decision based on the law and the evidence that you will [77] hear in this proceeding?

MR. COUSINS: Yes.

MR. EBERT: Could you do that?

MR. STEWART: I'll do that.

MR. EBERT: And neither one of you – I think you've indicated, but neither one of you would automatically vote against the death penalty; is that correct?

MR. STEWART: Vote against it?

MR. EBERT: Vote against it, right.

MR. STEWART: No.

MR. EBERT: You would consider both options and consider all the evidence; is that correct?

MR. STEWART: Yes.

MR. EBERT: Sir, you indicated that you had seen some media coverage of some type. Could you put that aside and render your opinion based solely on what you hear presented in this courtroom?

MR. STEWART: Sir, I'd say that would be very difficult for me to do it.

MR. EBERT: Well, it may be difficult, but do you think that you could do that, sir?

MR. STEWART: I honestly don't think I could.

* * *

[80] is?

MR. CORNWELL: Mr. Cornwell.

MR. BAKER: And you are Mr. Cousins?

MR. COUSINS: Yes.

MR. BAKER: The first question I have, would each of you seek further instruction from the Judge if you

did not fully understand the meaning of any instruction he gave in this case? In other words, if you didn't understand it, would you ask the Judge for further instruction?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: The next question, would you disapprove of a member of your family marrying a person of a different race for that reason and that reason only?

MR. COUSINS: No.

MR. STEWART: No.

MR. BAKER: Is the answer no from everyone?

MS. COTMAN: Yes.

MR. BAKER: Do you believe persons of Afro-American or African descent are more likely to commit crimes than persons of other races?

JURY PANEL: (Indicating in the negative.)

MS. COTMAN: Definitely not.

* * *

[86] convictions which either, shall we say, strongly support or strongly disapprove of the death penalty?

MR. COUSINS: No.

MR. BAKER: If you were to convict this Defendant of capital murder, as you have heard the charge, would you automatically vote to impose the death penalty?

MR. COUSINS: No.

MR. BAKER: Do you believe that younger people generally act more impulsively than we do when we get a little mature?

MR. COUSINS: That's my experience.

MR. BAKER: I'll just preface this. Mitigation is something that lessens the offense. That's what the term means in these questions I'm going to ask you.

Could you consider a Defendant's youth as a factor in mitigation in determining a sentence in this case?

MR. COUSINS: I guess I could.

MR. BAKER: This again goes to the mitigation factor, related to the same thing. Could you consider a Defendant's loss of a father and mother at a young age as being a factor in mitigation? Could you consider that?

[87] MR. COUSINS: We're not talking recently, we're talking –

MR. BAKER: At a young age. Could you consider that as a factor?

MR. COUSINS: I don't think so.

MR. BAKER: Could you consider a Defendant's remorse, in other words, the fact that he was extremely sorry, that term as a factor in mitigation?

MR. COUSINS: That's possible.

MR. BAKER: Sir, have you or anyone you know personally been the victim of a serious crime?

MR. COUSINS: No, I can't say so.

MR. BAKER: Sir, have you read any newspaper articles about this case?

MR. COUSINS: I read the first one in the Potomac News, as I recall.

MR. BAKER: Sir, have you watched or listened to any broadcast news reports concerning this case?

MR. COUSINS: No.

MR. BAKER: Sir, based on what you have read, heard or viewed, have you formed an opinion as to the Defendant's guilt or innocence?

MR. COUSINS: No.

* * *

[94] they could consider same; right?

MR. DOBYNS: Yes.

MS. ROGERS: Yes.

THE COURT: We'll proceed with the questioning. Is there any juror who could never vote to impose the death penalty or who would refuse to even consider the imposition in this case? I believe two of you have already answered that. The two who have not, you could consider it?

MS. ROGERS: Yes.

MR. DOBYNS: (Nodding head.)

THE COURT: Now, if you were to sit as a juror, and actually I will ask, I believe, Mr. Dobyns and Ms. Rogers. Let me address this question to the two of you predicated on the previous answer.

If you were to sit as a juror in this case and the jury were to convict the Defendant of capital murder, would you be able to consider voting for a sentence less than death, depending on the evidence?

MS. ROGERS: Yes.

MR. DOBYNS: Yes.

THE COURT: I'll ask all four of you additional questions. Do each of you understand that the

• • •

[97] So at this time you're excused. You may go with the bailiff, if you would, please.

(Ms. Bonner and Ms. Crummett were struck for cause.)

THE COURT: Ms. Rogers and Mr. Dobyns, if you'll just remain seated, counsel are going to ask you a few more questions and then we'll proceed.

Mr. Ebert?

MR. EBERT: There are a few questions we would like to ask each of you concerning your qualifications to serve, and Mr. Willett and I particularly want to thank you for coming here and giving up your valuable time in this most important case.

You understand, of course, this is what we call a capital case and the law permits the imposition of the death penalty; is that correct?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. EBERT: We have what we call a bifurcated proceeding. That means you would first hear evidence as to whether or not the Defendant is guilty or innocent. If you find the Defendant not guilty, that's the end of it. If you find the Defendant guilty, then you will hear [98] further evidence. Do you understand that?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. EBERT: You would be willing to consider all the evidence in both proceedings?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. EBERT: Not only in terms of guilt, but in affixing punishment?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. EBERT: Do you understand you must find – the Court told you this and you've answered it, but you must find the Defendant guilty beyond a reasonable doubt?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. EBERT: If you do not, of course, that's the end of it, and if you do, then you go further.

Do you understand that this burden is no different in this case than any other criminal case, that's the standard burden of proof?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

• • •

[100] you have any moral, ethical or religious scruples or personal beliefs against capital punishment?

(Ms. Rogers and Mr. Dobyns indicated in the negative.)

MR. EBERT: If you were to find the Defendant guilty, you said you could consider the death penalty. You can likewise consider something less than death, could you not? In other words, you'd consider both options?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. EBERT: And it would depend on the law and the circumstances and the evidence you will hear before you reach that decision?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. EBERT: But there's no reason you could not consider both options; that would be life imprisonment or the death penalty; is that correct?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. EBERT: Do you have any views that would impair your performance as a juror in this case, whether personal or religious or otherwise?

• • •

[102] correct?

MS. ROGERS: I'm Ms. Rogers.

MR. BAKER: Again, I'll introduce myself, William Baker, and myself and Mr. Morissette represent the Defendant, and the questions aren't designed to embarrass you in any way, but to help us to select a proper jury that's going to sit in this case.

My first question, and I'll ask it together and then some will be individually. Would you seek further instruction from the Judge in this case if you did not fully understand the meaning of his instructions that he's given you?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. BAKER: Would you disapprove of a member of your family marrying a person of a different race for that and that reason only?

(Ms. Rogers and Mr. Dobyns indicated in the negative.)

MR. BAKER: Do you believe that persons of an African descent are more likely to commit crimes than persons of other races?

(Ms. Rogers and Mr. Dobyns indicated in the

• • •

[106] (Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. BAKER: The next three questions deal with something called mitigation. I'll define the term. Mitigation is something that lessens the offense. In other words,

you've done the offense, but because of these circumstances, you would consider it worthy of a lesser sentence. That's the best way I can define it.

I'll ask if you could consider these factors as matters in mitigation. Do you understand my definition?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. BAKER: Could you consider youth as a factor in mitigation, the Defendant's youth?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. BAKER: Could you consider the fact that he lost his mother and father at an early age as a factor in mitigation?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. BAKER: Could you consider the fact that [107] he was remorseful as a factor in mitigation; remorse meaning sorry?

(Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

MR. BAKER: Have you or anyone you know personally ever been the victim of a violent crime?

(Ms. Rogers and Mr. Dobyns indicated in the negative.)

THE COURT: Have you read any newspaper articles concerning this case?

MS. ROGERS: No.

MR. DOBYNS: Yes.

MR. BAKER: Have you watched or listened to any broadcast news reports concerning this case?

MS. ROGERS: Not that I remember, no.

MR. DOBYNS: No.

MR. BAKER: And, sir, based on what you've read, have you formed an opinion as to the Defendant's guilt or innocence?

MR. DOBYNS: No.

MR. BAKER: Have you or any member of your family ever been employed as a law enforcement officer? By that I mean police officers.

* * *

[112] THE COURT: This is a capital murder case. It carries a possible death penalty. With that understanding, do you have an opinion such as would prevent you from convicting anyone of an offense punishable with death?

(Ms. Richardson, Ms. Ford and Mr. Trynock indicated in the negative.)

MS. MANNKE: Possibly.

THE COURT: Is there any juror who can never vote to impose the death penalty or who would refuse even to consider its imposition in a case?

JURY PANEL: (Indicating in the negative.)

THE COURT: So you would consider it?

MS. MANNKE: Yes, sir.

THE COURT: If you were to sit as a juror in this case and the jury were to convict the Defendant of capital murder, would you be able to consider voting for a sentence less than death? That would be life imprisonment.

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do each of you understand that the Commonwealth must prove the Defendant's guilt beyond a reasonable doubt?

* * *

[114] is a very important function as a citizen.

Any question I ask you is not intended to embarrass you in any way. I think the Court has asked you basically most of the (inaudible).

I think all of you realize that the case before you permits the imposition of the death penalty, do you not?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: We have what we call a bifurcated proceeding in this type of case. That means that you will hear evidence as to the guilt or innocence of the Defendant, and if you find the Defendant guilty beyond a reasonable doubt at that stage, then you will come back and hear more evidence before fixing punishment. Do you understand that?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Would all of you be willing to consider all of the evidence that you hear before either

finding him guilty and likewise before fixing punishment?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Do you understand that the burden on the Commonwealth is the same in this case as it is in any other criminal case; that is, we have to convict the

* * *

[116] MR. EBERT: I'll address this to all of you. Could you likewise consider something less than death if you felt the law and the evidence justified that, that being in this case, if he is convicted it would be either the death penalty or life imprisonment? You could consider both options; is that correct?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: That's correct for each of you?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: The evidence in this case will be that the Defendant is black and the victim was Hispanic. Would the fact that these people were of different races have any effect whatsoever on your verdict?

JURY PANEL: (Indicating in the negative.)

MR. EBERT: You could be fair and impartial with respect to the fact that they're different races?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Has anybody on the panel been employed by a law firm that practices criminal law?

(Ms. Richardson, Ms. Ford and Mr. Trynock indicated in the negative.)

MR. EBERT: I think you're a paralegal?

MS. MANNKE: Yes.

* * *

[127] Defendant of the capital murder as charged, and you've heard the charge, would you automatically vote to impose the death penalty?

JURY PANEL: (Indicating in the negative.)

MR. BAKER: Do you believe that younger people are generally more likely to act impulsively than people as they get a little mature?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: These next three questions deal with something called mitigation. Mitigation is something which serves to make the offense less serious, although it still is an offense. It's a factor like a first speeding ticket isn't as bad as the fifteenth speeding ticket. That's the best way I can describe it as far as the Court and the law is concerned. That's what mitigation means generally. So I'm asking you if you just could consider these as matters in mitigation.

Could you consider the Defendant's youth or his relative age as a factor in mitigation?

MS. MANNKE: No, sir.

MR. BAKER: You could not consider that?

MS. MANNKE: No.

MR. BAKER: Do you understand what I'm saying?

[128] MR. EBERT: She's answered that question, Your Honor.

MR. BAKER: Okay, she's answered. She said she couldn't consider it. Okay.

Could you consider the fact that he lost a father and mother at an early age as a matter in mitigation?

MS. MANNKE: No, sir.

MS. FORD: (Shaking head.)

MR. BAKER: Could you consider the Defendant's remorse as a factor in mitigation?

MS. MANNKE: No, sir.

MR. BAKER: Could any of you consider those as factors?

MR. TRYNOCK: I don't believe so.

MS. RICHARDSON: (Shaking head.)

MS. FORD: (Shaking head.)

MR. BAKER: Have you or anyone you know personally been the victim of a violent crime?

(Ms. Richardson, Ms. Ford and Mr. Trynock indicated in the negative.)

MR. BAKER: Ms. Mannke?

MS. MANNKE: I'm not sure if it's a violent

* * *

[135] carries the possible death sentence. With that understanding, let me ask you this question. Do you have any opinions such as to prevent you from convicting anyone of an offense punishable with death?

JURY PANEL: (Indicating in the negative.)

THE COURT: Is there any juror who could never vote to impose the death penalty or who would refuse even to consider its imposition in this case?

JURY PANEL: (Indicating in the negative.)

THE COURT: If you were to sit as a juror in this case and the jury were to convict the Defendant of capital murder, would you be able to consider voting for a sentence less than death as well?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do you understand that the Commonwealth must prove the Defendant's guilt's beyond a reasonable doubt?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do each of you understand that the Defendant is not required to produce any evidence, the burden is on the Commonwealth?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do you know of any reason

* * *

[137] this charge permits the imposition of the death penalty. Do you understand that?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: We have what is known as a bifurcated trial in this proceeding. That means that you will hear evidence concerning the guilt or innocence of the Defendant. If you find the Defendant guilty, then you would hear more evidence that determines what would be the appropriate sentence.

If he is convicted of capital murder, you have two options; either to sentence the Defendant to death or to life. I take it that all of you could consider either option; is that correct?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Do any of you have any religious, moral or personal scruples against the death penalty?

JURY PANEL: (Indicating in the negative.)

MR. EBERT: Do you understand that the burden of proof is on the Commonwealth to prove the Defendant guilty beyond a reasonable doubt in this case, as in every case? Do you understand that?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Do you understand that the fact

* * *

[141] determining our strikes, since the Judge asked who should sit on this jury. The questions I will ask will be together to the panel of four unless indicated that it's individual.

The first thing I need to do, the jury order, you're Ms. Willis; is that correct?

MS. HAYWARD: No; I'm Ms. Hayward.

MR. BAKER: Ms. Hayward, okay. Thank you. Ms. Willis?

MS. WILLIS: Yes.

MR. BAKER: And Mr. –?

MR. VUILLE: Vuille.

MR. BAKER: And Mr. Painter?

MR. PAINTER: Yes.

MR. BAKER: I would ask the panel as a whole, would you seek further instruction from the Judge in this case if you did not fully understand the meaning of the instructions which the Judge gives you?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: Would you disapprove of a member of your family marrying a person of a different race for that reason only?

JURY PANEL: (Indicating in the negative.)

* * *

[146] MR. BAKER: What service was that, sir?

MR. PAINTER: United States Navy.

MR. BAKER: What was your specialty?

MR. PAINTER: Aviation ground support.

MR. BAKER: Mr. Ebert has touched on this and I think you've all said that none of you have any religious convictions that either strongly support or prohibit the death penalty. Is that a correct statement?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: Now if you were to convict this Defendant of the capital murder as charged, would you automatically vote for the death penalty?

MS. HAYWARD: If necessary.

MR. BAKER: I mean, the Judge has told you what the charge is and what I'm stating – I'll ask you the question. If you were to find the Defendant guilty of this charge, which the Court has read, would you automatically vote for the death penalty without considering anything else?

JURY PANEL: (Indicating in the negative.)

MR. BAKER: Do you believe that younger people are a little more likely to act impulsively than those that get more mature?

[147] JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: Now the next question I'm going to talk about, all of them are general facts and they deal with something called mitigation. Mitigation is something that can be considered with respect to sentence, not with respect to guilt or innocence, but with respect to sentence.

In other words, somebody who has done something, but because they have a good record and have never done this before, it should be a factor in considering their sentence.

Do you all understand what I mean by the term mitigation?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: The next three questions I'm going to ask you are really whether you can consider these factors.

Could you consider the Defendant's youth or relatively young age as a factor in mitigation in determining a sentence in this case?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: The next one, could you consider the Defendant's loss of father and mother at a young age [148] as a factor in mitigation in determining a sentence in this case?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: Could you also consider the Defendant's remorse, that he was sorry, as a factor in mitigation in determining a sentence in this case?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: Have you or anyone you know personally ever been the victim of a violent crime?

MR. PAINTER: Are you talking about –

MR. BAKER: Violent crime, I'm talking something like robbery, assault, a crime of violence, murder. Is there anybody here who has or knows anybody or have a close friend?

JURY PANEL: (Indicating in the negative.)

MR. BAKER: Have any of you read any newspaper articles concerning this case?

JURY PANEL: (Indicating in the negative.)

MR. BAKER: Have any of you ever watched or listened to any broadcast news reports or radio reports concerning this case?

(Ms. Hayward, Ms. Willis and Mr. Painter indicated in the negative.)

• • •

[155] THE COURT: If you were to sit as a juror in this case and the jury were to convict the Defendant of capital murder, would you be able to consider voting for a sentence less than death?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do each of you understand that the Commonwealth must prove the Defendant's guilt beyond a reasonable doubt?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do each of you understand that the Defendant is not required to produce any evidence?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do you know of any reason whatsoever why you cannot give a fair and impartial trial to the Commonwealth and to the accused based solely on the evidence you will hear in this courtroom and the instructions of law which I will give you?

JURY PANEL: (Indicating in the negative.)

THE COURT: Ladies and gentlemen, this case will probably take more than one day; actually it will take

several days to be heard. With that understanding, do any of you know of any reason why you would not be able to sit as a juror in this matter?

* * *

[159] were against it as a matter of principle?

MR. VANRIJN: Uh-huh.

MR. EBERT: And there came a point in time in your life when you –

MR. VANRIJN: Swayed the other way.

MR. EBERT: I'll ask you this question. The belief that you have now or had in the past, would that make it impossible for you to find the Defendant guilty of a capital offense?

MR. VANRIJN: No, sir.

MR. EBERT: Then I take it, it would not make it impossible for you to impose the death penalty if you felt that was appropriate.

MR. VANRIJN: Correct.

MR. EBERT: I take it from all of your answers nobody would automatically vote against imposing the death penalty.

MS. LYNCH: I would think long and hard about it before voting to impose it.

MR. EBERT: I think all of us would, but in any event, you would not automatically vote against is; [sic] is that correct?

MS. LYNCH: Right.

[160] MR. EBERT: Do any of you have any views that would substantially impair your ability to sit on this type of case?

JURY PANEL: (Indicating in the negative.)

MR. EBERT: All of you would be able to consider not only imposing the death penalty, but you would likewise be able to impose life if you felt that was appropriate and assuming the Defendant was found guilty; is that correct?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Realizing that if he is found guilty, you'll have two options, either to impose the death penalty or not to impose the death penalty, in that event it would be life?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: The evidence in this case will be that the Defendant is black and that the deceased or the victim was Hispanic. Would the fact that the people are a different race have any bearing on your findings?

JURY PANEL: (Indicating in the negative.)

MR. EBERT: In other words, it would be the same if they were both the same race; is that correct?

JURY PANEL: (Indicating in the affirmative.)

* * *

[162] ask individually of you. You're Mr. Boyer; is that correct?

MR. BOYER: That's correct.

MR. BAKER: You're Mr. Vanrijn?

MR. VANRIJN: Vanrijn.

MR. BAKER: Ms. Lynch; is that correct?

MS. LYNCH: (Nodding head.)

MR. BAKER: The first question is to all of you. Would each of you seek further instruction from the Judge if you did not fully understand the meaning of any of the instructions that the Judge gave you?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: Would you disapprove of any member of your family marrying a person of a different race for that reason only? (Mr. Boyer and Mr. Vanrijn indicated in the negative.)

MS. LYNCH: I'm sorry. I didn't understand the question.

MR. BAKER: I'll repeat the question, ma'am. Would you disapprove of a member of your family marrying a person of a different race for that reason only?

* * *

[168] MR. BAKER: If you were to convict the Defendant of the capital murder as charged, which has been read to you or you heard read this morning, would you automatically vote for the death penalty?

JURY PANEL: (Indicating in the negative.)

MR. BAKER: Do you believe young people generally act more impulsively than people as they are more mature?

MR. BOYER: No, sir.

MR. BAKER: Mr. Vanrijn?

MR. VANRIJN: I suppose to a certain degree.

MR. BAKER: Ms. Lynch?

MS. LYNCH: I would say yes.

MR. BAKER: The next three questions all deal with matters of mitigation. Mitigation is evidence, if you will, that relates to the sentencing and it is evidence which basically you can consider at sentencing. An example is if somebody commits an offense, but they've never done anything in their past, the fact they hadn't done anything –

MR. EBERT: Your Honor, that's not a question.

MR. BAKER: I'm just trying to define it. I ran into problems with this, they didn't understand it. [169] I'm just trying to define it before I ask the question.

MR. EBERT: Your Honor, he can ask the question, but to start talking about somebody who has never done anything in the past, I don't think that's a question –

THE COURT: Just ask the question. We'll proceed.

MR. BAKER: Well, mitigation relates to sentencing. It has nothing to do with the offense. So I'm

asking you these questions. Could you consider a Defendant's youth as factor in mitigation in determining a sentence in this matter?

MR. BOYER: I'm sorry. Define mitigation again.

MR. BAKER: Mitigation has nothing to do with guilt or innocence. It only has to do with the sentence that should be imposed, such as the past, things like that, things that would tend to make the person less deserving of severe punishment. That's basically what it means.

MR. BOYER: I imagine that could become a factor.

MR. BAKER: I'm just asking if you can [170] consider it.

MR. VANRIJN: I suppose so.

MS. LYNCH: Would you repeat the original question?

MR. BAKER: The original question, could you consider a Defendant's youth as a factor in mitigation in determining a sentence in this case?

MS. LYNCH: Yes.

MR. BAKER: In the same way, could you consider the Defendant's loss of a father and mother at an early age as a factor in mitigation in determining a sentence in this case?

MR. BOYER: It could become a factor.

MR. BAKER: That's all I'm asking.

MR. VANRIJN: It could be a factor.

MS. LYNCH: (Nodding head.)

MR. BAKER: Could you consider also the Defendant's remorse as a factor in mitigation in determining a sentence in this case? Remorse, that he was sorry. Could you consider that in determining a sentence in this case?

MR. BOYER: Yes.

MR. VANRIJN: I suppose.

[171] MR. BAKER: Ms. Lynch, I'll just ask if you can consider it.

MS. LYNCH: I could consider it.

MR. BAKER: Have you or anyone that you know personally ever been the victim of a serious crime, a serious crime meaning robbery, serious assault, something like that?

JURY PANEL: (Indicating in the negative.)

MR. BAKER: Have any of you read any newspaper articles about this case?

MR. BOYER: No, sir.

MR. VANRIJN: Yes.

MS. LYNCH: I have, but I don't remember the details.

MR. BAKER: Have you watched or listened to any radio broadcasts or television news reports in this case?

MR. BOYER: No, sir.

MR. BAKER: Mr. Vanrijn?

MR. VANRIJN: I think so. I think it was on the radio.

MR. BAKER: Ms. Lynch?

MS. LYNCH: I probably have, but –

* * *

[177] even to consider its imposition in this case?

JURY PANEL: (Indicating in the negative.)

THE COURT: If you were to sit as a juror in this case and the jury were to convict the Defendant of capital murder, would you be able to also consider voting for a sentence less than death? That would be life in prison.

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do you understand that the Commonwealth must prove the Defendant's guilt beyond a reasonable doubt?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do you further understand that the Defendant is not required to produce any evidence, the burden is on the Commonwealth?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do any of you know for any reason whatsoever why you cannot give a fair and impartial trial to the Commonwealth and to the accused based solely on the evidence you will hear in this courtroom and the instructions of law which I will give you?

JURY PANEL: (Indicating in the negative.)

THE COURT: Ladies and gentleman, this case

* * *

[179] Defendant asks questions and then we'll reaffirm what they have just answered.

(The jury panel was sworn by the Clerk.)

THE COURT: Ladies and gentlemen, before the Commonwealth proceeds, the answers that you have given then, you have just sworn to, that they were truthful answers to the questions that the Court has asked; is that correct?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: All right. Mr. Ebert?

MR. EBERT: I think all of you understand the case before you permits the imposition of the death penalty; do you not?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Likewise, I'll tell you, we have in this case what we call a bifurcated proceeding. That means that you will hear evidence concerning the Defendant's guilt or innocence. If you determine the Defendant to be guilty beyond a reasonable doubt, then you will hear further evidence to determine what should be the appropriate punishment; do you understand that?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: And I think, from what you've said [180] earlier, all of you could impose the death penalty

and could consider imposing it if the facts and circumstances would all justify the same; is that correct?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: And it would be fair to say that you could likewise consider something less than the death penalty; that is, imposing life if the facts and circumstances would all justify it; is that correct?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Would all of you be willing to consider all of the evidence that comes before you at the, shall we say, guilt or innocence stage and at the penalty stage, if we reach that point?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: You've all said that you understand that the burden is upon the Commonwealth to prove the Defendant guilty beyond a reasonable doubt. Does anyone feel that the Commonwealth should have to go beyond that burden simply because this carries a death penalty? Do you follow what I mean?

In other words, the same burden would apply in this case as it would in any other criminal case.

JURY PANEL: (No response.)

[181] MR. EBERT: Would any of you require more than

JURY PANEL: (Indicating in the negative.)

MR. EBERT: And you could follow the Court's instructions in that regard; is that correct?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Do any of you have any moral and ethical or religious scruples or personal beliefs against the death penalty?

JURY PANEL: (Indicating in the negative.)

MR. EBERT: I take it from what you've said earlier nobody would automatically vote against the death penalty; is that correct?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Do any of you have any regard, irrespective of any beliefs, irrespective of your beliefs concerning the death penalty, that would impair your ability to be fair and impartial in this matter?

In other words, would you have any personal belief in such a case that would make you reluctant or impair your ability to follow the Court's instructions?

JURY PANEL: (Indicating in the negative.)

MR. EBERT: The evidence in this case will be

* * *

[182] MR. BAKER: Thank you, Your Honor. Ladies and gentlemen, like Mr. Ebert, I'd like to thank you on behalf of myself and my associate, Mr. Morissette, for taking your valuable time to come here on this very important matter. Again, my questions aren't intended to embarrass you in any way, but they are something we have to ask to determine whether we can get an appropriate jury in this case. I will ask you questions directed at each of you and I also will ask questions with respect to

individuals. The first question I have for the entire panel is would each of you seek further instructions from the Judge if you did not fully understand the meaning of any of the instructions that he gave you in this case?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: Is the answer yes?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: Next question is would you disapprove of a member of your family marrying a person of a different race for that reason only?

MS. CHAPPELL: Would you repeat that?

MR. BAKER: I sure will. Would you disapprove

* * *

[188] MR. BAKER: Mr. Pama?

MR. PAMA: No.

MS. BARRETT: Not me personally.

MR. BAKER: Do any of you personally hunt or shoot for recreation?

JURY PANEL: (Indicating in the negative.)

MR. BAKER: I know you said your sons did, but none of you have personally?

JURY PANEL: (Indicating in the negative.)

MR. BAKER: Next question is to all of you. Do you believe a person can commit an act in fear and panic which is out of character for them?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: I think Mr. Ebert touched it, but none of you have any religious convictions, either strongly disapprove or pro death penalty; is that correct?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: If you were to convict the Defendant of capital murder, as he is charged in this case, would you automatically vote for the death penalty?

MS. CHAPPELL: Would you repeat that?

MR. BAKER: I'll repeat it. If you were to convict the Defendant of capital murder, as he is charged [189] in this case, and you heard the charge read, would you automatically vote for the death penalty?

(Ms. Chappell, Mr. Scott and Mr. Pama indicated in the negative.)

MS. BARRETT: I thought that was decided by the Judge.

MR. BAKER: No, ma'am. Would you, as a juror?

MS. BARRETT: Do we get choices?

MR. BAKER: As Mr. Ebert explained, it's a bifurcated trial if we get to that, and his questions touched on that bifurcated two stage trial. One part is on the finding with respect to guilt or innocence, the second part is on the sentencing, and that's the part I'm referring to. I'll repeat the question. If you were to convict the Defendant of capital murder, as he's charged with, would you automatically vote for the death penalty?

MS. BARRETT: No.

MR. BAKER: Do you believe that young people generally act more impulsively than people with more maturity or older people? Do you all agree with that?

JURY PANEL: (Indicating in the affirmative.)

MR. BAKER: The next question deals with [190] mitigation. The term mitigation has nothing to do with guilt or innocence. It relates to the sentencing and it's something you should consider on the sentencing only, and these three questions deal with the term mitigation.

Could you consider a Defendant's youth as a factor in mitigation in determining a sentence in this matter? I'll rephrase it for you, ma'am, or I'll repeat it for you.

I explained what mitigation was. It doesn't have anything to do with guilt or innocence, only with the sentencing. I'm asking you could you consider a Defendant's youth or the fact that he's young as a factor in mitigation in determining a sentence in this matter?

MS. CHAPPELL: (Nodding head.)

MR. BAKER: Mr. Scott?

MR. SCOTT: No.

MR. PAMA: (Nodding head.)

MS. BARRETT: (Shaking head.)

MR. BAKER: Again, I'm just asking if you could consider these things, nothing else. Could you consider the Defendant's loss of a father and mother at an early age as a factor in mitigation in determining a sentence in this matter?

[191] MS. CHAPPELL: (Shaking head.)

MR. SCOTT: (Shaking head.)

MR. BAKER: Do you want me to repeat the question, Ms. Chappell?

MS. CHAPPELL: (Shaking head.)

MR. BAKER: Mr. Scott?

MR. SCOTT: No.

MR. BAKER: Mr. Pama?

MR. PAMA: (Shaking head.)

MS. BARRETT: (Shaking head.)

MR. BAKER: An, [sic] Ms. Barrett, I take it your answer is no; is that correct?

MS. BARRETT: That's correct.

MR. BAKER: The last one is could you consider the Defendant's remorse, being sorry, as a factor in mitigation in determining a sentence in this matter? I'm asking if you could consider it.

MS. CHAPPELL: (Shaking head.)

MR. SCOTT: (Nodding head.)

MR. PAMA: (Nodding head.)

MS. BARRETT: Possibly.

MS. CHAPPELL: His remorse, no, I don't think so.

[192] MR. BAKER: I'm just asking could you possibly consider it. You said you could.

MS. BARRETT: Well, maybe possibly.

MR. BAKER: Have you or anyone you know personally ever been the victim of a violent crime, murder, robbery?

Ms. Chappell?

MS. CHAPPELL: (Shaking head.)

MR. BAKER: Mr. Scott?

MR. SCOTT: (Shaking head.)

MR. BAKER: Mr. Pama?

MR. PAMA: About three years ago I had – my wife's first cousin, who was very close to us, got killed. He was a police officer, from a drug shootout, and that affects me.

MR. BAKER: Having said that, do you think since this case involves a police officer as a victim, do you think your personal experience would affect your deliberations in this case?

MR. PAMA: It could.

MR. BAKER: It could?

MR. PAMA: He was real close.

MR. BAKER: Do you think that you could put it

• • •

[205] THE COURT: Is there any juror who could never vote to impose the death penalty or who would refuse even to consider its imposition in this case?

JURY PANEL: (Indicating in the negative.)

THE COURT: If you were to sit as a juror in this case and the jury were to convict the Defendant of capital murder, would you be able to consider voting for a sentence less than death?

MR. LANCASTER: Would you say that again, please?

THE COURT: All right, sir. If you were to sit as a juror in this case and the jury were to convict the Defendant of capital murder, that is the charge of which he was arraigned on, would you be able to consider voting for a sentence less than death; in other words, life imprisonment?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do both of you understand that the Commonwealth must prove the Defendant's guilt's beyond a reasonable doubt?

JURY PANEL: (Indicating in the affirmative.)

THE COURT: Do you further understand that the Defendant is not required to produce any evidence, the

• • •

[207] hopefully –

MR. LANCASTER: That would not be a problem for me. If it got into next week, it possibly could be.

THE COURT: It may go into Monday, just assume it might. I can't say that it will for sure, but it may go into the first part of next week.

MR. LANCASTER: The first part of the week would not be a problem.

THE COURT: Mr. Ebert?

MR. EBERT: Gentlemen, as the Court has told you I'm Paul Ebert. Mr. Willett and myself are here on behalf of the Commonwealth and we want to thank you for serving as jurors. I know you realize this is a very important case and I hope you realize the questions we ask are not intended to embarrass you or make you uncomfortable in any way.

I think you've already answered most of these, but you do understand in a capital offense such as this that a potential penalty is the death penalty, do you not?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: We have what we call a bifurcated proceeding in this type of case. That means that you will hear evidence as to the guilt or innocence of the [208] accused. If you find the Defendant guilty beyond a reasonable doubt, then you will hear evidence as to the appropriate punishment. Could you consider all of the evidence that you heard and apply it at the proper time according to the Court's instructions?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: I think you said that you understood that the burden is upon the Commonwealth to prove the Defendant guilty beyond a reasonable doubt. Do you understand that burden is the same in all criminal cases, including this one?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: The fact that this is a potential death penalty case, would you require any more than that burden On the Commonwealth?

JURY PANEL: (Indicating in the negative.)

MR. EBERT: Do you have any moral or ethical or religious or personal beliefs against capital punishment?

JURY PANEL: (Indicating in the negative.)

MR. EBERT: I think you both indicated that you could consider imposing the death penalty in the [209] appropriate case based on the evidence and the law and you could likewise consider imposing something less, that being life imprisonment, assuming the Defendant was convicted; is that correct?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Regardless of what your views are for or against the death penalty, do you have any beliefs that might impair your ability to sit in judgment of this type of case?

JURY PANEL: (Indicating in the negative.)

MR. EBERT: The evidence in this case will indicate that the Defendant is black and that the victim is Hispanic. Would the fact that the people are of different races have any effect upon your ability to be fair and impartial?

JURY PANEL: (Indicating in the negative.)

MR. EBERT: You would consider it the same if they were both of the same race; is that correct?

JURY PANEL: (Indicating in the affirmative.)

MR. EBERT: Have either of you been employed by a law firm that practices criminal law?

JURY PANEL: (Indicating in the negative.)

MR. EBERT: Have either of you had a family [210] member or a close personal friend that has been prosecuted for a criminal offense, and if so, do you feel that person received a fair trial?

MR. COUTINHO: No.

MR. LANCASTER: No one ever prosecuted.

MR. EBERT: They're both acceptable to the Commonwealth, Your Honor.

THE COURT: Thank you, Mr. Ebert.

Mr. Baker?

MR. BAKER: My name is William Baker. On behalf of my associate, Mr. Morissette, and myself, I'd also like to thank you for coming here today and paying attention to this very serious case. I have some questions, which like Mr. Ebert's, are not to embarrass you in any way, but which will aid us in determining the jury to sit in this case and are very important in the jury determination. My first question will be addressed to both of you unless I address it individually. Would you seek further instruction from the Judge in this case if you did not fully understand the meaning of any of the instructions that he gave you?

JURY PANEL: - (Indicating in the affirmative.)

* * *

[214] MR. BAKER: What was your occupation?

MR. LANCASTER: Administrative specialist.

MR. BAKER: Adjutant General's field? What field was that in?

MR. LANCASTER: Basically AG, yes.

MR. BAKER: Neither of you have any religious convictions which either strongly support or strongly disapprove of the death penalty; is that correct?

JURY PANEL: (Indicating in the negative.)

MR. BAKER: If you were to convict the Defendant of capital murder, as charged, you listened to the charge earlier this morning, would you automatically vote for the death penalty?

MR. COUTINHO: No.

MR. LANCASTER: I'd have to hear the Judge's instructions first off, but the death penalty based on a conviction of murder by itself, no.

MR. BAKER: Do you believe that young people generally act more impulsive than the people with more maturity or older people?

MR. LANCASTER: I believe so.

MR. COUTINHO: It depends.

MR. BAKER: The next three questions deal with [215] mitigation. Mitigation is a term that has nothing to do with guilt or innocence, only as to sentencing. I'm asking you, in sentencing could you consider a Defendant's youth as a factor in mitigation in determining a sentence in this matter?

MR. COUTINHO: I don't understand the question.

MR. BAKER: Mitigation is a term which means some reason that they should receive a lighter or a less severe sentence. That's what the term means, good character or something of that nature, which could be considered to give them in awarding a person a lesser sentence. Do you understand the term?

My question to you is could you consider the Defendant's youth as a factor in mitigation in determining a sentence in this case?

MR. COUTINHO: Yes.

MR. LANCASTER: I think it would have to be weighed with the evidence.

MR. BAKER: I understand. You could consider it with all the other evidence?

MR. LANCASTER: Yes.

MR. BAKER: Could you consider the Defendant's [216] loss of a father and mother at a young age also as a factor in mitigation in determining a sentence in this matter?

MR. COUTINHO: Yes.

MR. LANCASTER: I think so.

MR. BAKER: Could you consider the Defendant's remorse as a factor in mitigation in determining a sentence in this case? Do you understand what I mean by remorse?

MR. COUTINHO: No.

MR. BAKER: You don't understand the term or you couldn't consider it?

MR. COUTINHO: Yeah, I could consider it.

MR. BAKER: Have you or anyone you know personally ever been the victim of a violent crime?

MR. COUTINHO: No.

MR. BAKER: Mr. Lancaster?

MR. LANCASTER: Not that I can recall.

MR. BAKER: Mr. Lancaster, have you read any newspaper articles concerning this case?

MR. LANCASTER: Me?

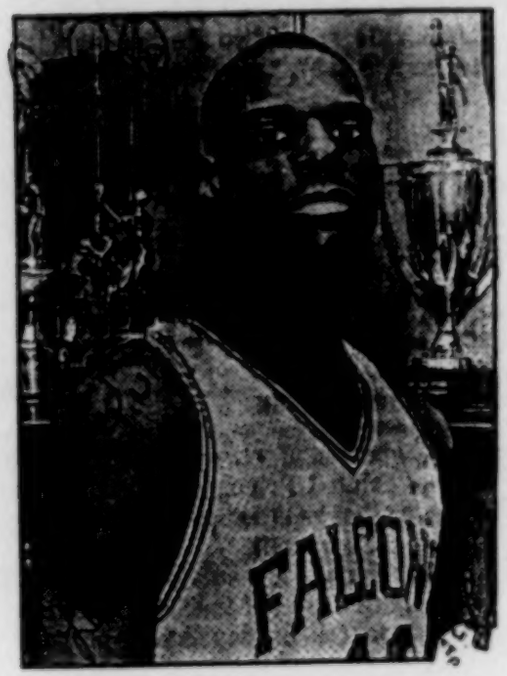
MR. BAKER: Yes, sir.

MR. LANCASTER: No, I have not.

* * *

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]



LONNIE WEEKS
Seventy-First Leader

Athlete Of The Week

Weeks Answers Coach's Call

By Earl Vaughan
Staff Writer

When he was evaluating his returning talent a few weeks ago, Seventy-First High School boys' basketball Pete House made no secret of the fact Lonnie Weeks was going to have to play a pivotal role if the Falcons were to do well.

Just two games into the season, Weeks has more than lived up to his coach's expectations.

Seventy-First opened the season last week with victories over Richmond Senior and Scotland. Weeks scored a total of 58 points, grabbed 29 rebounds and shot 64 percent from the field in the two games.

His performance earned him this week's Fayetteville Observer-Times Athlete of the Week honors.

"I just hope we haven't jinxed ourselves" House said. "As young as we are, we've got to have so many guys play well. But Lonnie had an excellent week. He's such a fierce competitor."

House felt attitude had a lot to do with Weeks' fast start. "He played like a senior, played with leadership qualities," House said. "We've been trying to prime him to be a leader for us this year and to be our captain.

"I thought he did that better than anything. The other strong point for the week was the other kids did a good job of getting him the basketball."

Weeks, 6-foot-3, is playing the low post for the Falcons this year, so most of his shots come inside. But even though he was shooting from close range, he admitted concern about his accuracy last week.

"I knew that my shot wasn't really on," he said. "I tried to do the best I could and it started falling.

"People are expecting me to do a lot, and I'm trying to do the best I can, I don't feel too much pressure, because I just go out there and do what I have to do, I

think I can keep it up as long as I get support from everybody."

Nominations for Athlete of the Week must be received no later than Sunday evening immediately following the nominated performance(s). Telephone 323-4848 or 1-800-682-3476.



Staff Photo By CINDY BURNHAM

Seventy-First's Lonnie Weeks Grabs Rebound Against Tigers

RALLY

Seventy-First Leads Mid-South After 82-80 Overtime Victory

RALLY

Seventy-First Leads Mid-South
After 82-80 Overtime Victory

Prep Roundup, Pages 2-C, 3-C
By EARL VAUGHAN
Staff Sports Writer

HOPE MILLS – South View High School boys' basketball coach Ro[ ] Miller called it "the hardest loss I've ever had in my life."

Miller and his Tigers watched visiting Seventy-First come back from a 15-point halftime deficit and rally for an 82-80 overtime victory over South View.

The triumph was Seventy-First's second in three tries against South View this year and its seventh consecutive victory overall.

The Falcons are in sole possession of first place in the Mid-South 4-A Conference, 7-1 in the league, 16-1 overall. South View, which suffered its second straight loss, is 6-2 in [Line missing in copy.] 53-34 win over South View behind Cheryl McNair's 20 points.

The Falcons are 17-0 overall, 8-0 in the league.

South View, 3-5 in the conference and 3-12 for the season, was led by Katrina Heath with 11 points.

Levell Lewis was the hero for Seventy-First's boys as he scored 26 points, 10 of them in the final period as the Falcons wiped out a 12-point South View lead with 6:10 left in regulation to force the overtime.

Gerriod Griffin had a chance to give South View a three-point lead with 20 seconds showing, but only hit one of two free throws to put the Tigers on top 75-73.

Lewis was fouled with seven seconds on the clock and went to the line for a one-and-one.

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

• • •

Luther J. Waddell – Direct

[84] THE COURT: Mr. Morissette?

MR. MORISSETTE: Nothing.

THE COURT: Thank you, Mr. Daniels, you are excused, you may go, sir.

(Witness excused.)

THE COURT: Next witness?

MR. EBERT: Luther Waddell.

Whereupon

LUTHER WADDELL

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EBERT:

Q State your full name, sir, and give your address.

A Luther James Waddell, 3446 Chesterbrook Drive, Fayetteville, North Carolina.

Q Now, Mr. Waddell, are you presently incarcerated?

A Yes.

Q And where are you incarcerated?

* * *

[86] Q And which of you graduated first?

A I did.

Q Now, did there come a point in time – you were previously incarcerated prior to this time; is that right?

A Yes.

Q And when did you get out on that incarceration?

A I was incarcerated twice before this, which one is you talking about?

Q When is the last time?

A Last April, April of '92.

Q And soon thereafter did you become an associate of Mr. Weeks?

A Yes.

Q And how often would you see him?

A Every day.

Q In what capacity would you see him?

A Say what?

Q Did you go by his home, what have you?

A Yeah.

Q Did there come a point in time when you and he had occasion to enter the home of one, Gene Farmer?

A Yes.

Q And how did you come – did you know whether or [87] not Mr. Farmer was going to be away from home?

A Yeah, I knew.

Q And how did you know that?

A This dude who stayed down the street told me, live in my neighborhood.

Q Would that have been Mr. Jay Leach?

A Yeah.

Q As a result of that did you have a conversation with the Defendant?

A Yes.

Q And what did you talk about?

A Talking about Terrell was going to be away from his house, he was locked up, and it would be easy to go up in his house and get his stuff.

Q And did you and the Defendant go to his home?

A Yes.

Q How were you traveling?

A I drove.

Q What kind of vehicle?

A A red truck.

Q Whose truck was that?

A It was my girlfriend's truck.

Q And what did you do upon entering the home?

[88] A Looked around first, and then we just put some stuff in some boxes and took it out.

Q What did you take from that home?

A TVs, stereo equipment, speakers, and his car, that's it.

Q Had the home already been entered prior to your getting there?

A Yes.

Q And these items were still there?

A Yes.

Q And did there come a point in time when you saw the Defendant with anything in his hands? In other words, was there one point in time when you were upstairs?

A Yes.

Q And what happened?

A What do you mean what happened?

Q Did he come upstairs? Did he tell you what he found?

A Yeah, I was upstairs. He came upstairs and told me he had the car keys.

Q And did you see them?

A Yes.

Q What did he have in his hand at that time?

[89] A He had a purple bag with car keys in it.

Q A purple bag? Did you ask him where he found it?

A Yes.

Q What did he say?

A In the cabinet in the kitchen.

Q What's that?

A In the cabinet in the kitchen.

Q In the cabinet in the kitchen?

A (Nodding head.)

Q And what was the attitude when he came upstairs?

A He was happy.

Q Happy?

A Yeah.

Q And do you know why he was happy?

A I guess because he found the car keys.

Q And did he, in fact, take the car?

A Yes.

Q Well, I guess both of you drove it.

A Yeah.

Q Who drove it away from the scene?

A Lonnie drove it away from the scene.

Q What did you do with the property that you had

* * *

[98] the gun?

A Yeah.

Q And why is it that you wanted it?

A Because we had a beef with this other drug dealer.

Q Was his name Dutloe?

A Yes.

Q And what caused that beef?

A It started because he didn't want us selling drugs where we were selling them at, in the neighborhood we were selling them in.

Q What happened as a result of that?

A What you mean?

Q What did Mr. Dutloe do to Mr. Weeks?

A He hit him in the head with a gun.

Q He hit Mr. Weeks in the head with a gun?

A (Nodding head.)

Q Was that a 25 caliber gun?

A Yeah.

Q As a result of that did you and Mr. Weeks have a discussion as to what you were going to do to Mr. Dutloe?

A Yeah.

Q And what was that?

* * *

[109] Luther J. Waddell – Recross

BY MR. EBERT:

Q What type of drugs did you sell, sir?

A Cocaine.

Q What type of Cocaine?

A Crack.

Q Do you use drugs?

A Marijuana.

Q To your knowledge does the Defendant use drugs other than Marijuana?

A No, sir.

Q Does not?

A Unh-unh.

Q So, you sell Crack Cocaine for profit; is that right?

A Uh-huh.

MR. EBERT: That's all I have.

MR. BAKER: Your Honor, I have one question, only.

THE COURT: All right, sir.

RECROSS EXAMINATION

BY MR. BAKER:

Q You state you hadn't talked to Mr. Ebert before last night, that's correct?

• • •

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

• • •

[199] jury returns.

(Brief recess.)

THE COURT: Counsel, I have received two questions from the jury. The first question reads as follows: During Special Agent Roland's first he read Mr. Weeks his rights and asked him did he understand these rights. He did by remaining silent. At the second interview he asked if he remembered and understood his rights. He said yes.

Question: During any one of these interviews did anyone ask Mr. Weeks if he wanted an attorney present on his behalf? Then, a line and another question. If not, would this confession be admissible in court?

Second question: What law states that it is legal to coerce A, this says suspense with the intent – I'm sure they meant a suspect, with the intent to get a confession, parenthesis, (lie about a fact of evidence), parenthesis close.

I have responded as follows to both questions with a single answer. The evidence before you for your consideration has been admitted by this Court. It is your duty to weigh all the evidence in arriving at your verdict.

Does either counsel wish to add to that?

[200] Mr. Baker?

MR. BAKER: No, sir, that's the law.

THE COURT: Mr. Ebert?

MR. MORISSETTE: Your Honor, I think it might be appropriate to – I believe there's a standard instruction on the weight to be attached to the Defendant's confession. Obviously, I was unprepared for this question, Your Honor, I can't remember it off the top of my head. But I know there's a specific instruction that tells the jury that they may weigh the circumstances and the confession in determining the weight to be given to the confession. And I would ask you to respond with that instruction.

THE COURT: Commonwealth?

MR. EBERT: I don't think it's necessary. Would the Court repeat again what you intend to tell them?

THE COURT: The evidence before you for your consideration has been admitted by this Court. It is your duty to weigh all the evidence in arriving at your verdict. And that's predicated on the question that says would this confession be admissible in court. We're already in court and we've already gotten to that point, objections noted and so forth, and we've proceeded accordingly. So, we're not going to go back and retry it.

[201] MR. EBERT: I wonder if the Court would prefer to say, you're not to concern yourself with whether or not such matters are admissible, they're properly before you at this time. Something like that.

THE COURT: Does the Defendant wish to be heard on that additional?

MR. MORISSETTE: Perhaps you should give both, Your Honor. Again, I think they're inquiring – they

have some concerns about the confession and the weight to be given to it.

MR. EBERT: I'd say in addition to what you've said, Your Honor.

MR. BAKER: I thought his original instruction is exactly what the law is.

THE COURT: Does either counsel wish to be heard?

MR. MORISSETTE: I submit it to the Court.

THE COURT: You submit it to the Court.

Mr. Ebert?

MR. EBERT: I'd like for you to add, I think it might be more clarifying, that you're not to concern yourself with whether or not such evidence is admissible and it's properly before you.

[202] THE COURT: All right, sir, I'll add that phrase to the response. The court will be in recess, then, until the jury returns.

(Brief recess.)

THE COURT: Gentlemen, I've received another question from the jury. The question is: Was Officer Cavazos right or left handed? I've responded that they must proceed on the evidence that has been presented before them. Both counsel concur?

MR. BAKER: Concur.

MR. EBERT: (Nodding head.)

THE COURT: All right, sir, I'll have the bailiff to return this question and answer. I see it's almost 5:30. I'm going to have him bring the jury forward and we'll be taking an evening recess at this time in this particular matter. The Court will be in recess for just a few minutes while he goes down and returns the question and answer back to the jury and gets them ready to come forward. So, we'll take a very brief recess.

(Brief recess.)

THE COURT: All right.

(Whereupon, the jury entered the courtroom and resumed their seats in the jury box.)

• • •

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

We, the jury, find the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER, as charged in the Indictment.

/s/ David L. Dobyns
FOREPERSON

/s/ David L. Dobyns
PRINT FOREPERSON'S NAME

Commonwealth of Virginia

vs. Criminal Number 33170

Lonnie Weeks, Jr.

October 21, 1993

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

* * *

[10] this, one of the most difficult of all cases. It's the eighth time I've had the duty to stand before the citizens of this community and ask that the life of another individual be taken.

I take no pleasure in that and it's not easy, and I know it's an awful burden for you folks. But, I've taken an oath, as you have taken, and you are to consider certain ev lence now, as well as the evidence that you've heard, and determine what is the appropriate sentence for the crime of – that you have convicted the Defendant.

You look at the Defendant. He's a young man. The evid nce revealed to you that he had a lot of opportunities that many people his age and stature do not have. But, nevertheless, I will submit to you that the evidence will show that his looks are deceptive.

The evidence will show to you that what he did was vile, horrible and inhuman. You've reached that conclusion to some degree, I'd submit. The evidence will show to you – and the evidence you've heard will show to you – that he's dangerous.

Now, at this point in time, you will hear evidence concerning some of the background and you will hear evidence concerning the impact that Jose Cavazos'

* * *

[13] conditions.

However, what the jury must now do is decide the two alternatives that are open to them. That is, one, death; and the other, life in prison.

We will introduce evidence to show that this Defendant basically lead a good life for approximately eighteen years. He lived in a terrible neighborhood infested by drugs. Violence was rampant and yet he stayed out of trouble.

We'll show also that this individual was a regular churchgoer for eighteen years. I guess if there's anything to be learned outside this case, would be that going to church is good for one because, as Lonnie Weeks went to church, he never got in trouble. He never got in trouble.

As Mr. Ebert alluded to, this was an individual with some promise. This was an individual who was a star basketball player, an individual that probably could have been scholarship material to an ACC team and maybe have played in the NBA. Coach House will testify that he probably – his coach at Fayetteville 71st High School – will testify he was one of the finest basketball players he ever had, and he tried.

[14] We'll also introduce evidence from his friends that Lonnie never, with the one exception, was a violent person. He didn't get in fights.

I believe Coach House will testify he never got ejected from a game. He never can remember him even getting a technical foul. For those of you who know something about basketball, a fierce competitor can get a technical foul rather easily because tempers do rise. But, that's not Lonnie Weeks' background.

So, you as the jury will have to consider this. Now, we won't submit to you that Lonnie Weeks did not go bad after he finished high school and after he quit going to church, because he certainly did things.

Mr. Ebert alluded to you he has a conviction for selling drugs. Yes, he does. He has one conviction on his record involving sale of marijuana, which he was sentenced to, I believe, three years in prison, suspended. That is the only conviction he has.

He has no juvenile record, and I'll submit to you, ladies and gentlemen of the jury, when you hear evidence of the neighborhood he came from and the type of – shall we say – community it was, he was the exception. That's what makes this all the more remarkable.

[15] Now, the problem – Lonnie did not get to go to college because of his grades. Even though he became academic ineligible his senior year, he still was recruited by a junior college, Mount Olive, and he was preparing to go there.

You'll also hear evidence that Lonnie has two children by two different women, but also that he cares about these children and he tried to support them. He wasn't able to get good jobs, so he sort of took the easy path.

Now, this is an individual that you will see the human side of him. What he did, obviously, cannot be forgiven. However, the question will be, should he pay the ultimate price for this, or is there enough goodness in this individual that this jury could find mercy in its heart to spare his life.

Ladies and gentlemen of the jury, that is the part of the trial that we now proceed with.

Thank you.

THE COURT: Mr. Ebert?

EVIDENCE ON BEHALF OF THE COMMONWEALTH

MR. EBERT: Sergeant Casey.

THE COURT: Sergeant Casey?

* * *

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

* * *

M. W. Casey – Direct

[19] Q Was this substance packaged?

A It was packaged, yes, sir, it was. It was approximately twenty-five small bags packaged for sale and delivery on the local street level, in what we call dime bags.

Q Did you likewise find any money at the time of your search?

A Yes, sir, we found three hundred and ninety-two dollars in U.S. currency.

Q Where did you find that, sir?

A In the front bedroom of the trailer.

Q How many people were in the residence when you searched it?

A A total of five, sir.

Q What were the names of the other individuals?

A A Jerry William McNeal, an Angela Louise Williams and a Reginald Dwayne Townsend.

Q Did you place all these individuals under arrest?

A Yes, sir, we did.

Q Same charge?

A For the same charge, yes, sir.

Q Were all these individuals convicted in regard [20] to this search and your arrest?

A Yes, sir.

Q Now, of the individuals that were occupied and were arrested in connection with this conspiracy, did the others have criminal records?

A Yes, sir, they did.

Q Would you tell the ladies and gentlemen of the jury what records –

MR. BAKER: Objection, Your Honor, I believe that's totally irrelevant to this Defendant's case.

THE COURT: Mr. Ebert?

MR. EBERT: If it please the Court, I think the record and the type of person he's associating with, he's dealing with, has bearing on this particular case to show the background and the environment in which this man was operating his business.

MR. BAKER: Again, I object, Your Honor. The record of his co-defendants is totally – of the co-defendants in that case is totally irrelevant to these proceedings.

THE COURT: I'll allow the question. Go ahead, Mr. Ebert.

MR. BAKER: Objection noted, please, on the [21] grounds of the Fifth, Sixth, Eighth, Fourteenth Amendments to the Constitution of the United States.

BY MR. EBERT:

Q Would you repeat for the – or tell the ladies and gentlemen of the jury the record of the persons involved?

A Okay, Ms. Monique Townsend's been charged with larceny, possession of drug paraphernalia, possession of a stolen vehicle, assault on a law enforcement officer. Ms. Williams has been charged with possession with intent to sell and deliver marijuana, conspiracy to possess with intent to sell and deliver marijuana. Another charge on Ms. Townsend is a possession with intent to sell and deliver marijuana.

Reginald Dwayne Townsend has possession of a stolen vehicle, possession of stolen goods, breaking and entering and larceny, second degree burglary, breaking and entering, felony larceny.

Mr. McNeal was charged with forgery and uttering, four counts, trespassing, possession of stolen vehicle, possession with intent to sell and deliver marijuana and maintaining a place for marijuana.

Q Now, was the Defendant eventually convicted of

[22] the charge that you placed?

A Yes, sir, he was.

Q You know the disposition of the matter at the time of sentencing?

A Yes, sir, I do.

Q What was that, sir?

A He plead guilty to a ten-year felony, was convicted and was given three years suspended, for five years supervised probation.

Q Do you know what the street value of the marijuana that you found at the time of your search was?

A The street value would be approximately around seven hundred fifty, eight hundred dollars.

Q Did you – you found no cocaine? Is that correct?

A No, sir, no cocaine.

MR. EBERT: That's all I have of this witness.

THE COURT: Mr. Baker?

MR. BAKER: A couple.

CROSS EXAMINATION

BY MR. BAKER:

Q Detective, you're with Fayetteville Police Department, Narcotics Division?

* * *

[24] A A tremendous amount of shootings, yes, sir.

Q Now, sir, you've alluded to the record the five other people charged in this – excuse me, four other people.

There were four people – five people charged including the Defendant? Is that correct?

A Yes, sir.

Q You've alluded to the records of the four people. What was Mr. Weeks' record?

MR. EBERT: Your Honor, we'll stipulate he had no record prior to this time.

MR. BAKER: I've got no further questions.

THE COURT: May we excuse this witness, counsel?

MR. EBERT: Yes, sir.

MR. BAKER: Yes, sir.

MR. EBERT: Your Honor, I did not do this, but I would move to adopt the evidence which the jury previously heard in the guilt phase to be utilized in the sentencing stage, pursuant to law.

MR. BAKER: I cannot object.

THE COURT: All right, sir. That will be adopted, as well, then, sir.

• • •

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

• • •

Ralph Marshall – Direct

[40] jury a bit about his background and how he came to be a State Policeman?

A When I first met Jose, he was what we term a weight enforcement officer. These are the officers who work at the scales and enforce the weight laws and the laws governing the truck traffic.

He then transferred over to the position of Trooper, and I knew him as what we call a WEO, a weight enforcement officer, and also knew him because his children and my children attended the same school, so we were – I met him not only in a professional basis, but also in a personal, off-the-job basis.

Q Now, he was a bit old to be, shall we say, a rookie trooper, was he not?

A Yes, sir, he was older and about my age, and was affectionately referred to as "Papa." I [sic] lot of the troopers refer to me as "Dad." It's just a respect that they pay, I guess, to us older members of the Department.

Q Do you know how he was regarded among his fellow troopers?

A Very highly regarded and revered.

Q Could you describe a bit about his personality and the means, if you know, of how he would enforce the

* * *

[42] members of the State Police who had been involved in this investigation to gather at the McCord Center. There were two people who identified themselves as psychologists at the meeting, who had been trained in counseling individuals who had been involved in traumatic experiences.

The meeting was well attended. There were approximately twenty-five people who attended this session. At the session, the mode or the mood was set by all of us agreeing that we would talk openly; that we could openly express our feelings and that we would not go out and individually name someone who reacted in what many police officers felt was less than a manly manner.

I think police officers, more than other professions, try to put up a very straight front, big-boys-don't-cry kind of attitude, and they hide your [sic] feelings, over the thirty years that I have worked and have known and dealt with the troopers. They all want to give the appearance of being beyond grief or beyond sorrow.

This was the first time that we had held such a session and I had never had the opportunity to attend one. But, I have never seen the outpouring of grief, [43] sorrow and hurt that I saw at this meeting. I had tears in my eyes, and I don't think there was – it was a very moving experience. I'll tell you, I –

Q From your observation, have you continued to see an effect of Trooper's Cavazos' death on the members of the Virginia State Police?

A Yes, sir, I have.

MR. EBERT: That's all I have.

THE COURT: Mr. Baker?

MR. BAKER: No cross.

THE COURT: Can we excuse this witness, counsel?

MR. WILLETT: Yes, sir.

THE COURT: Mr. Marshall, thank you for your time and testimony. You're excused and you may go, sir.

(Witness excused.)

THE COURT: Your next witness?

MR. WILLETT: Jeanette Galbraith, please?

THE COURT: Jeanette Galbraith, please. Whereupon

JEANETTE GALBRAITH

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been duly sworn,

* * *

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

• • •

Jeanette A. Galbraith – Direct

[46] considered Jose and his family very close friends of mine. I've been to his house numerous times, spoken to Jose about unrelated work, just about his family life, everyday life.

He was concerned about all the members that he worked with. He shared everything with us. It was more of a personal, as well as a work relationship.

Q Ms. Galbraith, tell the jury, please, under what circumstances you came to learn of his death.

A Approximately an hour and fifteen minutes before the incident, I had left Jose at the area office. On this particular evening, his shift followed mine. We had a brief conversation at the office, ending with the words, "Be careful; have a safe shift." I departed.

Q You said that to him?

A I said that to him. It's a habit I have to my co-workers.

I went home. Typically, after a shift, I don't go immediately to bed. I – it takes me time to wind down and relax.

I was watching TV, a late show, when the dispatcher called the house. I also live with another trooper, and she made sure that both of us were on the [47] phone and she gave us the words, "Jose's been shot."

Q What was your initial reaction to that?

A Panic, disbelief, anger, helplessness. I guess those are the only words I could use to describe it.

Q How has this loss been absorbed by you, Ms. Galbraith, since February of this year?

A Well, I guess emotionally my first reaction was to immediately get dressed and leave the house. I went straight to the Washington Hospital Center, because that's where I felt I could best be of use.

I felt like the family needed someone they knew to be around them, and I guess that's where you feel the helplessness, because there's nothing you can say, nothing you can really do to change the circumstances.

I went through probably close to a week of little to no sleep, which took a draining out of your system. As far as my work, when I did have to go back to work and I came upon the first vehicle I was going to stop, there was an uneasiness in me – I guess a fear.

We all come to the job knowing different possibilities and, when something like this happens – excuse me – you sort of question your faith in people in general and whether they really even care about what [48] you're doing out there, whether there's a regard for you as a person or your position.

It was hard to stop that first car, hard to approach something I didn't know. It took a couple stops to make me realize that most of the people that I deal with are just good – good people. I guess it just helped me become even more cautious in my everyday job habits.

Q Have you noticed whether your fellow troopers have undergone a similar experience? Are they any more cautious? Have they been more hesitant? Have they experienced fear?

A We discussed it. The first few days back to work it wasn't uncommon to meet other co-workers in a cross-over at a certain location and just discuss things, work things through.

You could sense, not only in their voices but their wives' or spouses' voices, the fear and concern. It's become a habit for most of us now to tell each other to be careful.

Q I take it that for a Trooper, man or woman, fear is not something that is readily acknowledgeable by people in your profession?

A Not – no, we don't acknowledge it all the

• • •

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

• • •

Douglas Buchanan – Direct

[53] than a co-worker?

A No, I didn't; just as a – as my shift partner and as a friend.

Q How would you describe Trooper Cavazos?

A Very nice man, very easy to get along with, a very kind person, always willing to help you out, always could depend on.

Q Did you have occasion to watch him in the course of traffic stops?

A Yes, I did.

Q How was his demeanor and how did he treat the public?

A He was extremely friendly, very outgoing, very helpful, very personable person, very polite, took time out to explain things to people.

Q Did you ever see him be aggressive in any manner?

A Never.

Q Now, sir, you say that you – and I think your testimony the other day indicated that you actually tried to assist him and revive him? Is that correct?

A Yes, I did.

Q You were unable to do so? Is that correct?

* * *

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

* * *

[56] Q Are you trained for anything else?

A No, I'm not.

MR. EBERT: That's all I have.

THE COURT: Mr. Baker?

MR. BAKER: No cross.

THE COURT: Thank you, Trooper. You may have a seat.

(Witness excused.)

THE COURT: Next witness?

MR. EBERT: Mrs. Cavazos.

Whereupon

LINDA CAVAZOS

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. EBERT:

Q State your full name, please, and give your address.

A I'm Linda Queen Cavazos. My address is 10079 Greenwich Wood, Nokesville, Virginia.

Q I know it's hard for you, ma'am, but I'll ask you just a few questions, if you don't mind.

* * *

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

* * *

Lonnie Weeks, Jr. – Direct

[62] MR. BAKER: How long, sir?

THE COURT: About five minutes.

Ladies and gentlemen of the jury, at this time, the Court's going to take a brief recess. If you'll please, go with the Bailiff. We'll be in recess for about five minutes.

(A brief recess was taken.)

THE COURT: Are you ready to proceed, counsel?

MR. BAKER: Yes, sir.

EVIDENCE ON BEHALF OF DEFENDANT

MR. BAKER: I call the Defendant to the stand.

THE COURT: Mr. Weeks?

Whereupon

LONNIE WEEKS, JR.

the Defendant, was called for examination by counsel on his own behalf, and, after having been duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BAKER:

Q State your full name, please?

A Lonnie Weeks, Jr.

Q How old are you, sir?

A Twenty-one.

[63] Q Sir, what was your father's name?

A Lonnie Weeks, Sr.

Q When did he die, sir?

A 1982.

Q Where were you at that time, sir?

A I was in Fayetteville, North Carolina.

Q What happened – I'll ask another question. Do you have any brothers or sisters, sir?

A Yes, I do.

Q Who are they, sir?

A I have a younger brother.

Q What is his name?

A Deangelo Van Weeks. I have an –

Q How old is he?

A He's fourteen.

Q Who else do you have, sir?

A I have two younger half twin sisters and I have an older sister. She's twenty-three.

Q Would you speak up, please? We've got to hear you.

A I have an older sister, and she's twenty-three.

Q Now, after your father died, who did you live [64] with?

A My grand – well, I lived with my mother for a while.

Q What's your mother's name, sir?

A Aleena Mae Weeks.

Q Speak up, please.

A Aleena Mae Weeks.

Q Sir, how long did you live with your mother?

A It's maybe three, four years.

Q What happened – when did you cease living with your mother?

A When I was in the eighth grade.

Q Okay, what happened then, Mr. Weeks?

A We was living in Washington –

Q Speak up.

A We was living in Washington and came back, moved back to North Carolina in the eighth-grade year. My grand – I mean, my mother, she let us stay with our grandmother, Evelyn Leach.

Q Okay, so you left – you were left with your grandmother? Is that correct?

A Yes, sir.

Q How old were you then, Mr. Weeks, and speak [65] up, please. I'm having difficulty hearing you.

A I'd say I was about fourteen or fifteen.

Q When did you see your mother after that?

A I saw her occasionally. I can't really gave [sc] a specific time when I seen her, but I saw her occasionally, and I think the last time I saw her was in '91.

Q You haven't seen your mother since 1991?

A No, I haven't.

Q Have you tried to find her?

A Yes, I have.

Q Were you able to?

A No, I wasn't.

Q You know where she's at?

A I know she's in Fayetteville, North Carolina.

Q Now, you were left with your grandmother. What's her name?

A Evelyn Leach.

Q She raised you; did she not?

A Yes, she did.

Q You went to school at Fayetteville? Is that correct?

A Right.

Q What schools did you go to, sir?

[66] A I went to –

Q Speak up.

A Ann Chestnut (phonetic) Junior High School and 71st Senior High School.

Q You graduated from high school, did you not?

A Yes, I did.

Q What – did you have any special activities when you were in high school?

A When I was in the ninth grade, I played basketball, football and ran track. Tenth grade through twelfth grade I played basketball.

Q You played basketball for three years? Is that correct?

A Four years.

Q For Fayetteville 71st High School?

A Yes, I do.

Q Were you a starter?

A Yes, I was.

Q As a result of your playing, did you have the opportunity to go to college?

A Yes, I did.

Q You had scholarships?

A Yes, I did.

[67] Q Why didn't you take advantage of those scholarships?

A Well, at the time, I was involved with a young lady named Tina Townsend and she was pregnant and, at the time, I felt that I didn't want to leave her by herself.

My grandmother was encouraging me to go to college; it would be best interest of my future. But, at the time, I was thinking that I was doing the right thing by being by her side and waiting to go to college later.

Q You were academic ineligible the senior – the final part of your senior year, correct?

MR. EBERT: He's leading the witness now.

MR. BAKER: I'll rephrase the question.

BY MR. BAKER:

Q Why weren't you able to play the latter part of your year?

A Academics, at the end of the year.

Q What offers did you have at that time, after you graduated?

A I still had a scholarship at Mount Olive, four-year scholarship. They was going to send me to Tech for two years – junior college.

Q Why didn't you go take that scholarship?

[68] A Because, as I stated, my girlfriend at the time, she was pregnant.

Q How many children do you have?

A I have two.

Q What are the mothers of your children?

A Where are they?

Q No, what are their names?

A Tina Renee Townsend and Tamika Smith.

Q How have you tried to support your children?

A I've worked and, at one point in time, I went a wrong route and I tried to sell drugs, marijuana.

Q Now, what church did you go to, sir?

A Church of God, C and Adams Street.

Q Where is that located, sir?

A It's located in Fayetteville, North Carolina, downtown.

Q How often did you go to church?

A Every Sunday.

Q How long did you continue to do that, sir?

A I went to church until my last year of high school.

Q When was that?

A My last year of high school.

[69] Q Speak up, please. How often did you attend church after that?

A Not that much.

Q Were you – what activities did you participate when you went – attended church?

A I was in the choir. I was in the play. As I got older, I just – regularly just went to Sunday School and church.

Q What kind of jobs have you had, sir?

A My first job, I worked at Red Lobster. I think that was in –

Q What did you do?

A A [sic] was a bus boy. My second job, I worked at Holiday Inn, and I worked in the convention center. My third job, I think it was in '91, I worked at Best Products. I was a salesman, and then I worked at Mountasia (phonetic) Miniature Golf Course. I was working at the cashier.

I left North Carolina in '92, the summer, and went to Washington, and I worked at McDonald's the whole summer. When I went back to North Carolina, I got my job back at Mountasia, and I worked as a maintenance man. I quit the job at Mountasia and got a job working inventory [70] at Accu-Count.

Q Who did you live with in Washington?

A My grandparents.

Q What is their names, sir?

A Gloria Dukes and Louis Dukes.

Q After you returned to Fayetteville, what did you do then?

A I got back to Fayetteville in '92. That's when I started working at Mountasia. It was still hot. When the winter came, I was working outside and I didn't like it, so I got another job working inventory, which consisted of going out of town every day counting stores, and I worked at that job for about two months, two, three months at the most.

That job consisted of working – I worked in the beginning from four in the morning to one the next morning. This was every day, and I couldn't see my kids, like two, three weeks at a time, so I quit and wanted to get another one, another job and, at the same time, I wanted to enroll in barber school.

Q Sir, what kind of transportation did you have?

A Well, some jobs I had to walk. Other jobs I had to find the best ride that I would get.

[71] Q How many cars have you owned?

A I never owned a car.

Q Why?

A I never could afford to get one.

Q Now, did the time arise when you were selling drugs?

A Yes.

Q When was that?

A This was in '91, after I graduated, and I had moved in with my girlfriend at the time.

Q Which girlfriend is that?

A Tina Townsend. We was kind of struggling, so I thought I'd just take the easy way out –

Q Speak up, please.

A I thought I would take the easy way out and sell drugs; it was fast money.

Q When were you arrested?

A I was arrested in – I think it was the end part of December.

Q When did you go to court on that charge, sir?

A I went to court on that charge – I think it was April.

Q What happened to that – at that charge?

[72] A They gave me three years suspended and five years probation.

Q What were the conditions of those – probation?

A I wasn't supposed to get in trouble.

Q Speak up.

A I wasn't supposed to get in no type of trouble. I have no firearm. I ain't supposed to have no dirty urine and report to her on schedule.

Q When did you come to know Luther Waddell?

A I knew Luther for awhile, but I just knew him because he went to my school. I didn't never start hanging around Luther until –

Q Speak up, please.

A I didn't start hanging around Luther until the beginning of January of '93.

Q Did Luther come to you – did you and Luther, in fact, engaged in drug dealing?

A He never engaged me. There was times when we thought about it and we tried to. We saw that our friends, everybody else, a lot of our associates were selling drugs. They was making a lot of money, nice cars, and [73] we wanted the same thing, and the jobs that we was working in wasn't really paying us enough to have that. So, we was going to get our money together and try to get some – we knew that cocaine was faster than marijuana, so we wanted to try to get cocaine. But, our money could never get right, and we never was able to purchase no cocaine in order to make more money. There was times when we had our friends try to give us some to start like that, and we tried that one time, but we was really kind of nervous about doing it, being on the street, because everybody was always – the cops was always coming around and it was very hard.

Q Now, when did you acquire the gun, the Glock nine millimeter?

A I got the gun in, I think it was January.

Q How did you acquire it, sir?

A I had a friend named Ronald Dawson and we used to call each other from time to time; and, one day before I was going to work, I called him to see how he was doing, and he was nervous and he told me about his cousin shot somebody, and he thought the police was going to come over there, so he asked me to hold it for

him until everything – until everything cleared up and he wanted me

* * *

[75] A Yes, he did.

Q How did he do that?

A One day we was in the trailer park and we had friends down there who sold drugs or hung out. It was like, the people go there and hang out, talk, and he thought that me and Luther was out there selling drugs, because he felt he had to take over the trailer park and nobody could sell drugs in that trailer park, if it wasn't his.

So, we tried to tell him that we wasn't selling no drugs. We was just down there, so he left, came back and he had a pistol in his hand, and I was sitting on the ground. He grazed across the tip of my head with it and he told me to get up; if I get up, he was going to shoot me.

Q What did you do?

A So, I just sat on the ground and he, you know, the crowd was out there. I just sat on the ground until he left. He left; he came back; like he was tempted to do something but he never did nothing. Luther and I, we just left and went to my house.

Q I didn't hear that.

A Luther and I, we left and went to my house.

[76] Dutlow's friends, which I was acquainted to, they was telling me that he was going to kill me. But, see,

prior to that incident we ran into an incident of a female, and it was a personal thing between him and I and nobody else knew.

He had – I guess he had a grudge towards me or something, and I figured he had to get something to start off the conflict; and asked one of his friends, I said, "Why is he going off like this towards me?"

He said, "It must be something personal between you two." Right then, I knew what it was.

He kept saying that he was going to kill me if he saw me or kill Luther if he saw him. So me and Luther, we didn't know what to do. We wasn't – we were just going to hide in the house.

So, you know, we still went places, but we was always looking over our back, and we felt like we needed some protection, but we never really seeked (sic) to get it, because we barely ran into Dutlow that much after that incident.

Once I got – acquired the gun in my hand, first it was under my house. I kept it under my house. Then, once the threats started getting worse, I felt that [77] I had to have it. But, there was no way I could have it because you couldn't walk down Bunces Road really without – if you was nice dressed, maybe have some jewelry on, which I was a nice dresser. I had some jewelry – they would stop you, thinking that you had drugs on you walking down the street.

Q Who would stop you?

A The police would stop you and check you, so there was no possible way that I could carry a gun on me

and – without me knowing that I would get stopped and get checked.

There was times where we wanted it, and there was times when I went to work, and he said, well, he was going to go out somewhere and he needed it, so I gave it to him to protect himself. He said if something go down and you feel like Dutlow going to do something, he going to retaliate to that. He said Dutlow doesn't do nothing, he's not going to do anything, because he said he didn't want to hurt nobody if nobody wanted to hurt him.

Q Speak up, please.

A He said he didn't really want to hurt no one if nobody didn't want to hurt him.

Q Now, when did you make the decision to break [78] into Mr. Farmer's apartment?

A At the time I was involved with LaTanza Edwards and I was – was over her house one day and Luther came over there and he told me that a dude named Jake told him about this house, that Farmer was going to be locked up and we could go in the house.

So, I thought about it and I talked to LaTanza. She told me, "No, don't go, you know, that's not you. Don't go." But, you know, I was being more and more tempted by Luther, you know, to get some money.

So, I left. I went with him. When we got there, the glass was broke. The house was all messed up, and there was a TV that we took and stereo equipment, and we loaded it on a truck; and, as we was about to leave, our attention somehow just got onto a cabinet in the kitchen.

I opened it up, and there was this purple bag with the Volkswagen keys in it. So, I wondered if this was the keys to the car in the front, which Luther had told me it was his car. We tried it and it was.

So, right then that moment I was kind of excited to have – to be able to have a car that maybe I could drive that I never had. Then, you know, as the [79] night progressed, I started to think, well, I want to go to barber school and try to get another chance of playing basketball at the barber shop (sic).

My family in Washington, they have a family reunion every year, and I usually make some of them. I haven't made too many, and I wanted to see them real bad. I knew that I was going to be busy and I wasn't going to see anybody. So, I wanted to see them real bad. I mean, my mind was just focusing on seeing them.

So, that's when I left the next day to see them. And, before I left, I saw Luther and he asked me, he said, "What can you do with this car?" I asked him, "What do you mean?" He said, "What can you do with the car?"

Q Speak up, please.

A I said, "Well, I really can't do nothing with it. What you want me to do with it?"

He said, "Whatever you can do to try to get some money or something." I said, "Well, I don't really know nobody in Washington who could do anything like that." He said okay, so I left.

On the way, I stopped past my cousin house and I picked up my cousin.

[80] Q Who was your cousin?

A Eric Baker.

Q So, what happened then?

A Well, I told him – told him that I was leaving two, three days to go see my family and come back. Eric insisted that he wanted to come with me. I told him that there probably wouldn't be no room for him where I'm going because there's probably not enough room for me.

He said, "Well, I got a place that I can go in Virginia, Richmond, Virginia, stay with a friend." So, we called his friend and asked if he could stay, and his friend said yes. So, we left and went on the road and I dropped him off in Richmond.

I proceeded to keep going to Washington. I arrived in Washington late Monday night about ten, I guess.

Q How long were you in Washington?

A From Monday to – to that Wednesday.

Q Why did you – were you heading south, or headed down 95 South this fatal night?

A Because my grandfather had got in touch with my uncle to get in – so he can get in touch with me to let me know that my cousin was calling all night for me. [81] So, we was over a friend of his house and then I got in touch with my grandfather and he told me that my cousin was calling to get in touch with me.

So, I called the house where he was at and I talked to the guy that was there and he told me that Eric was upset; he wanted to leave the house. So, I talked to Eric,

and Eric, he said that he didn't want to stay there no more. He was having some type of problems with the person that was at the house.

I told him, I said, "Look, it's very late and I don't want to be on the road this late." He told me, "Well, if you don't come get me now, then I'm just going to go down the street somewhere and just go somewhere."

And, that I brung (sic) him up there, I kind of felt he was my responsibility. You know, he a grown man, but he's still family. So, I said, "Okay, well, I'll come and get you. Ask your dude if – I mean, ask your friend that's with you if he got some gas money so I could come and get you."

He said yes, so I left, and I told Dukes that I was going to go by myself to pick him up.

Q Which Dukes are we talking about?

A Louis Dukes.

[82] Q What relation is he to you?

A He's my uncle. He said, "No, I'll go with you." I said, "No, you can stay here. I just probably see you tomorrow or something." He said, "No because, you know, it was kind of late and you need somebody with you." I said okay.

He said, "Well, either you can drive there, I drive back or vice versa." I said, "Okay, you drive there and then I will drive back." So, he drove, and that's when we started to go to Richmond.

Q What happened when you first saw the police?

A Well, I knew my uncle, he was speeding kind of fast, but, you know, I was just sitting in the passenger seat. I was letting him drive.

As we approached the officer's car, I saw the reflection, and he was going – he was going pretty fast, so we went passed him very quick and, as I looked back, I told him, I said, "Oh, no." Then, as I looked back, I didn't see the car coming. So I said, "Well, he must have figured we was going too fast and he didn't want to worry with it."

But, as we got down a little bit further, he was still going fast. He – that's when I looked back [83] again and I saw him coming up, where he was at, and the lights flashed, and he was very far behind us.

So, as we was going, we slowed up, my uncle slowed up. By the time we got to the ramp to Dale City, officer was real close. He was behind us, so my uncle decided he would pull over on the bridge part.

Q Speak up.

A He decided he would pull over on the bridge part. So, we stopped and, at this time, I was very nervous.

Q Why were you nervous?

A Because I knew that I was on probation and I knew that the car was stolen, and so we just sat there for a while. When he stopped behind us and he came up to the door, Dukes – and he asked for his license and registration. So, Dukes gave him his license and a piece of paper from the glove compartment.

He told him to step out the car, so he stepped out the car.

Q Speak up.

A So, he stepped out the car, and I was still sitting in the front seat. Then, the officer, he said – he asked me to get out the car.

[84] So, when I looked down on the floor and the gun was under the mat, and there was a rail – we was close enough to a rail so, as I was stepping – as I was going to step out, I thought I was going to toss it over the rail.

As soon as I step out the car –

Q Where was the gun when you stepped out of the car?

A It was in my hand. When I stepped out the car, the gun was in my hand. I had it by the handle and I was going to toss it. And then I gripped it.

Q What?

A And I gripped the gun. And, before – before I explain what happened, I feel that, in order to maybe people in this Courtroom to understand where I'm coming from, I think that maybe –

Q Speak up.

A I think that maybe a Christian or a person who believes in God and the devil will understand what I'm about to say.

And, as I stepped out the car, it was just like something had just took over me that I couldn't understand. It

was like something – I felt like [85] something – the best way I can describe it is like something – I can't say something. I knew what it – well, to me, I felt like it was evil – evil spirit or something. That's how I feel. That's the best way I describe it.

In my body, I just – I mean, I couldn't hear nothing, and I just remember afterwards, not at the time, that I started firing the gun. And, once it stopped, I remember my ears popping. My hand came back and it was like something just left me, like left me just standing there, and I couldn't – I was standing there looking at the trooper, and I was just in a daze, couldn't believe what just happened. I didn't want to believe what just happened, but I knew that I had done it, because it just was in my hand. But I still couldn't believe it, so I was standing there, and I looked at my uncle, and he almost looked, maybe as a ghost or something.

He had a lot of fear in his face, and I guess he figured – I mean, he knowed (sic) that I never even attempted to do anything violent before, and it was a surprise to him –

MR. EBERT: Your Honor, he can't testify to [86] what his uncle had on his mind.

BY MR. BAKER:

Q Just what you saw, you can relate to, but not what he felt.

A Well, he looked at me in a very surprised – and he act like he didn't want to move because maybe – I thought that maybe he thought I was going to hurt him, because he just felt like I flipped or something. So, I just looked, turned back and looked at the trooper again. I

just could not move from the spot that I was in, it was beside on my side.

So, my uncle, he came from around the car and he told me to get in and drive. At the moment I still couldn't move and he had to push me. And, when I got in the car, I drove.

And he looked at me, and he said, "Damn, damn, look what just happened, what you just do." I don't remember saying anything. I was in a daze. It was like – I think he said something like, "I can't believe that you just did this" or something.

Q Speak up.

A I think he said, "I can't believe that you done this." I think I might have said, "Well, I can't

• • •

[88] there." I said – I was still running, and I said, "Okay." So, when I went back, there was – there was some cars out there lined up on the side. So, when I went back there, there was a – I saw a man on the ground on his face. Then there was a black man, an officer, and I think another man, and he was, I think, calling the trooper's name. He said, "Please help me turn him over."

So, the black man was by his upper body, his arm. The officer had his head and there was another man on the other side of – was on the other side of his body, and I was by his feet. He said, "Okay, let's turn him over." So, we all turned him over together.

Then, when I looked at him, he had blood and stuff on his face and body, and I turned my head. At that

moment, I wanted to say something, but I just was too scared to; I couldn't. I know the good in me wanted to, but I guess the bad in me just wouldn't let me.

So, as I was walking off, I saw my uncle's license and I picked it up and I put it in my pocket, and I started to go down the road, back down the highway, and I remember people at the scene, they was telling cars to

• • •

[95] I became a little fearful for my life. I talked to my little brother about it one night. I told him, I said, there's some conflict going on between me and somebody.

Q Speak up.

A I told him there's some conflict going on between me and an individual, and I said he wants to kill me over something very petty. I told him, I said, I feel I have to protect myself.

Q Why did you – why did you break into that house? Why?

A Well, I guess I could say more as – before, I knew I was in contact with the Lord and my life was going very well, and He was helping me achieve the things that I wanted.

By the time I got in twelfth grade and I stopped going to church, I didn't really actually say this, but I guess I felt like I didn't need Him any more, and so, to myself I say, well, I'm paying for – by my turning my back on Him, I obviously have an indecent mind.

When Luther came to me and talked to me about it, I just went along with it.

Q Why did you take that car?

A Because I had a one-track mind at the time and I was just so anxious – just so anxious to see my family in Washington again before I came back.

Q Now, you went to church for eighteen years of you life? Is that right?

A Yes.

Q You knew right from wrong, did you not?

A Yes, I did.

Q Can you explain what record – let me rephrase.

How much – had you ever gotten into trouble prior to that marijuana arrest?

A Never. I was – I really – I could have gotten in trouble, but I really couldn't have gotten in trouble because I was so busy with basketball during the school time and, in the summertime, I was at basketball camp, and I was going to church and my life just felt like it was right.

The trouble was – I wasn't around anyone who really got into trouble, so I just – I wasn't around any trouble. It was like I had friends and they wasn't the best of friends but, nevertheless, they was my friends. But –

[97] Q Speak up.

A But I didn't – you know, I didn't break into houses or think about doing things like that, I guess, until – until Luther came along. I started hanging with him, I'd say, about two months – two months.

MR. EBERT: Your Honor, I'm going to object to having him repeating what counsel has told him.

THE COURT: Sustained.

* * *

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

* * *

Bennie D. House – Direct

[102] DIRECT EXAMINATION

BY MR. BAKER:

Q Sir, would you please state your full name?

A Bennie David House.

Q Sir, what is your current address?

A 1954 Merrimac Drive, Fayetteville, North Carolina.

Q Sir, how are you employed?

A I'm a teacher and an athletic coach at Cumberland County Schools.

Q What school do you teach at, sir?

A I'm at 71st High School.

Q Now, sir, do you know the Defendant, Lonnie Weeks, in this case?

A Yes, sir.

Q How do you know him, Coach House?

A Lonnie was a member of our varsity basketball team for a year and a half. He came through our JV program in the tenth grade – we are grades ten through twelve – and was with us three years.

Q Now, did you have a great deal of contact with him when he played for you, Coach?

A Well, you do. It's almost daily, except [103] Sundays.

Q Did you talk to him a great deal?

A I try to split my time between all my ball players, yes.

Q Now, sir, do you know – how long have you lived in the Fayetteville area?

A This is our tenth school year.

Q Sir, you're familiar with the Fayetteville area, are you not?

A For ten years I am, yes, sir.

Q Do you know where Lonnie Weeks is from, where he lived?

A I know that he stays with his grandmother up on Bunces Road.

Q Sir, are you familiar with that area?

A Yes, sir.

Q Can you tell the jury what kind of area that is?

A It's a very horrible area. It's a horrible area to live in.

Q Why is that?

A Because of the crime rate. It's not safe to walk the streets. The road – it's not streets, but [104] they're roads

basically. It's a crime – the drugs, weapons, shootings, killings.

Q What kind of – how good a basketball player was the Defendant when he played for you?

A Lonnie came through and developed into a very fine basketball player; was our captain his senior year and was our leader his senior year. Basically, was our sole senior.

Q What were his characteristics as a basketball player? What did you notice about him specifically?

A Very competitive, always – always given every ounce of energy for the – for the game. He was on a team as a junior that was lucky enough to win a Holiday Classic championship and also a Conference championship, which in our area is very big.

Then, as a junior (sic), he had to shoulder a lot of the responsibility. He was our captain, our leader and, unfortunately, we lost him in January with grades. That was the only negative I can say, as far as he did not really have the grades, you know. As much as I talked and encouraged the grades, he still came up short in two courses.

He passed four out of six at the midterm. He [105] came back strong and, of course, he graduated in '91 at 71st High School.

Q Sir, you're familiar with his disciplinary record at Fayetteville 71st?

A Yes, sir.

Q Were you aware that he ever was expelled from school for any reason?

A Not in-school suspension or out-of-school suspension; never in a fight.

Q Sir, you say he was a fierce competitor on the basketball court. Did you ever – did he ever get in a fight in any of the games you coached?

A Never a fight; never a technical; always – always handled himself real well.

Q Now, sir, what was your reaction when you heard –

MR. EBERT: Your Honor, I'm going to object to that. His reaction as to – probably like a lot of people. I don't think that's relevant in this case, what somebody's reaction is to a given action somebody would take.

MR. BAKER: Your Honor, I believe it's relevant that the fact that – because of his character [106] and his past, that he thought it was – he was just shocked because it was so hard to –

THE COURT: Well, go ahead. I'll allow the question. Go ahead.

BY MR. BAKER:

Q What was your reaction, Coach House, when you heard this?

A Disappointment.

Q I beg your pardon?

A Disappointment. Horrible situation, horrible, to say the least, but disappointment, because somebody's

come through – well, somebody's come through our program and – just disappointment.

Q Had you ever observed anything in his past to indicate that he would do something like this?

A No, sir, not in the – no, sir, not – very behaved when he was – the three years he was at 71st High School.

MR. BAKER: May I consult with my co-counsel?

THE COURT: You may.

(Counsel confer.)

MR. EBERT: We don't have any objection to that, Your Honor, if he puts a picture of the basketball

* * *

[108] Q Coach House, were you familiar with the Defendant's economic conditions, his family condition with respect to money?

A Pretty much. I knew that Lonnie lived with the grandmother and she was working, as well. I try to make it a point of knowing where the players live, what area they can live in. I can better relate to the kids that way.

Knowing that he lived with his grandmother, you know, she's the – was the working – the working – at the time he was there, his grandmother did most of the work and his grandfather, at the time, was very ill and passed away some – I think in '90, so a very, very hard situation economically.

Q Sir, the school – you encouraged them to attend basketball camps, did you not?

A Well, we stay pretty active during the off season. We don't overdo it. We allow time for free time for other things that they've got to do besides basketball, of course, but we –

Q Was he able to attend these camps?

A Well, we – we try to make sure. They cut yards and trim lawns and do things like that in the

• • •

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

• • •

Tony McBride – Direct

[114] Q You know the Defendant in this case?

A Yes, I do.

Q Sir, how long have you known the Defendant?

A I know him for sixteen years.

Q How did you come to know the Defendant?

A I came to know him since I was about six years old growing up in Bunces Road, North Carolina, Fayetteville.

Q How often did you see him when he was growing up?

A I would see him on a weekly basis about six to five times a week.

Q How long did this continue?

A It continued throughout elementary, junior high and high school.

Q Okay. Did you have any activities with the Defendant?

A We played basketball together in junior high and the back yard or my yard.

Q Did you attend high school with him?

A Yes, I did.

Q That was Fayetteville 71st, was it not?

A Yes, sir.

[115] Q Sir, during the time you've seen the Defendant, did you ever see him get in any fights?

A No, I haven't, any fights, nothing like that.

Q Did you ever see him threaten anybody?

A No.

Q Now, when was the last time you saw the Defendant?

A Last time I saw him was right after high school, I'd say after I was in community college, about a good half a month into my curricula.

Q You're aware of what he stands convicted of here today, are you not?

A Yes, sir.

THE COURT: Mr. Willett?

MR. WILLETT: No questions of Mr. McBride.

THE COURT: Thank you, sir.

May we excuse Mr. McBride?

MR. BAKER: Yes, sir, he may also –

THE COURT: Mr. McBride, thank you for your time and testimony. You're excused. You may go. Thank you, sir.

(Witness excused.)

THE COURT: Your next witness?

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

* * *

Sean Beamon – Direct

[116] MR. BAKER: Mr. Sean Beaman, sir.

THE COURT: Mr. Beaman?

Whereupon

SEAN BEAMAN

a witness, was called for examination by counsel on behalf of the Defendant, and, after having been duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BAKER:

Q State your full name, sir, please?

A Sean Michael Beaman.

Q Sir, what is your current address?

A 6494 Terrytown Drive, Fayetteville, North Carolina.

Q Do you know the Defendant in this case?

A Yes.

Q Sir, how long have you known the Defendant?

A About eleven years.

Q How did you come to know him, sir?

A I grew up with him when I moved to Fayetteville.

Q During this period of time, did you associate with him?

[117] A Yeah.

Q In other words, were you around him?

A Yeah.

Q Did you go to school with him?

A Yeah.

Q Play basketball with him?

A Not really, but, you know –

Q Did you see him every day during the time you grew up?

A Yeah, basically.

Q Now, during the time that you've known him, did you ever see him get in any fights?

A No.

Q You ever see him threaten anybody?

A No.

MR. BAKER: Your witness, Mr. Willett.

CROSS EXAMINATION

BY MR. EBERT:

Q Just a couple of questions, Mr. Beaman. You saw him on a daily basis?

A Yes.

Q Would that be after he graduated from high school?

* * *

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

* * *

Renee Rogers – Direct

[119] jury.

A Renee Rogers.

Q Ma'am, what is your current address?

A 220-D Wilbur Avenue, Fayetteville, North Carolina.

Q Do you know the Defendant in this case?

A Yes.

Q Ma'am, how do you happen to know this Defendant?

A He's my nephew.

Q Ma'am, how long have you known him?

A Ever since he was a baby.

Q Were you aware of his family situation?

A Yes.

Q Did you know his father?

A Yes.

Q When did his father die?

A In 1982.

Q Where – when – excuse me.

Who took care of Lonnie at that time?

A Well, at that time, he was living with his grandmother.

Q Okay. Where did his mother go?

[120] A I don't know.

Q How did Lonnie come to live with his grandmother?

A Well, after his father passed away and he had went back to Washington for a little while, then he came back to Fayetteville, North Carolina, and the only person that was there to take care of him was his grandmother.

Q How old was he at that time? Do you remember?

A About twelve.

Q Now, did you see Lonnie often?

A Every day.

Q What was he like around the house?

A Quiet. He was pretty good, and he was quiet.

Q Ma'am, did his mother ever come back to the house?

A Maybe once or twice, but not on a permanent basis.

Q In the time you saw Lonnie around the house, did you ever see him get in fights?

A No.

Q Was he always respectful?

A Yes.

Q Did he do what he was told?

* * *

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

* * *

Juaneza Vivian – Direct

[121] A Yes.

Q You're aware of what he's done?

A Uh-huh.

MR. BAKER: Mr. Willett?

MR. WILLETT: No questions.

THE COURT: May we excuse this witness?

MR. BAKER: Yes, sir.

THE COURT: Ms. Rogers, thank you for your time and your testimony. You're excused and you may go.

(Witness excused.)

THE COURT: Your next witness, sir?

MR. BAKER: Ms. Juaneza Vivian.

THE COURT: Ms. Vivian.

Whereupon

JUANEZA VIVIAN

a witness, was called for examination by counsel on behalf of the Defendant, and, after having been duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BAKER:

Q Please state – well, state your full name, please?

A Okay, Juaneza Vivian.

[122] Q Would you spell that, please, for the court reporter?

A J-a-u-n-e-z-a, last name, V-i-v-i-a-n.

Q Ma'am, what is your current address?

A 6487 Terrytown Drive, Fayetteville, North Carolina.

Q Ma'am, do you know the Defendant in this case?

A Yes, I do.

Q How long have you know him?

A Since he was about age seven; I guess fourteen years, about 1979.

Q How did you come to know him, ma'am?

A I know – I'm a real close friend of his grandmother. I met him when his parents brought him from Washington, D.C.

Q Ma'am, how often did you visit his grandmother?

A Very often. So often that the children nicknamed me "Furniture."

Q What was he – what was he like, ma'am, as a child growing up in the house?

A He was very polite, pleasant child, well behaved, had good manners.

[123] Q When you say well behaved, what do you mean by that?

A Easy to discipline and not rowdy, unruly, you know. He was a good kid.

Q Did you know Lonnie's mother?

A Yes, yes.

Q How long has it been since you've seen her?

A I can't say, but it's been years.

Q Ma'am, was he – you say he was a good kid. Did he do what he was told?

A Yes.

Q Did you ever see him be disrespectful?

A No.

Q Now, what was your reaction when you learned of this?

A I was shocked. I was really shocked.

MR. EBERT: Your Honor, again, I'm going to object to that. Anybody's reaction isn't relevant in this case.

MR. BAKER: I believe Your Honor allowed me to ask Coach House that question.

THE COURT: Let's proceed. I'll allow it.

THE WITNESS: First, it was just totally out [124] of character for Lonnie for me, and plus, then, when

the news came and I found out it was a police officer, I was just horrified, to tell you the truth.

MR. BAKER: Excuse me, while I consult with counsel.

(Counsel confer.)

BY MR. BAKER:

Q Ms. Vivian, did you attend church with Lonnie?

A Yes, we all attended the same church together C and Adams Street Church of God.

Q Where is that, ma'am?

A Fayetteville, North Carolina.

Q Ma'am, how often did you go to church?

A We – at least twice a week.

Q Did Lonnie and his family also attend?

A Yes, they went with us.

Q Okay, did he come to stop going to church?

A Around in high – around in high school, I guess, when he, you know, didn't go as often as he used to.

(Counsel confer.)

BY MR. BAKER:

Q Do you remember any particular events with [125] respect to Lonnie at church?

A There's one event that stands out in my mind. I forget about how old. He wasn't very old, I guess, maybe,

nine years old. We had a Christmas program, you know, for the youth, put on their program.

Anyway, they wore white shirts and red bow ties and, when he come down the aisle, his face lit up and he threw his chest out and he just strutted. It was like, "this is the most important day of my life." It – that, it may not seem much but, to me, it sticks in my mind.

MR. BAKER: I don't have any further questions of Ms. Vivian. Your witness, Mr. Ebert.

THE COURT: Mr. Ebert?

CROSS EXAMINATION

BY MR. EBERT:

Q Ma'am, what you're telling us is he was raised in a good Christian home?

A Yes.

Q His grandmother's a fine person, isn't she?

A Yes, she is.

Q She gave him what she could?

A Yes, she did.

Q Someone who is not actually a parent but [126] raising him?

A Right.

Q There came a point in time when he began to change; did not go to church?

A About senior year.

Q Did he move away from the home?

A After graduation. I'm not sure, but I think it was after graduation.

Q But he did move away from home?

A Yes, uh-huh.

Q I take it you did not see him as much then?

A No, I did not.

Q You really didn't know what his activities were because you weren't around him, from what you say? Is that correct?

A That's correct.

Q Did you know any of the people that he was running with after he moved away from home?

A No.

Q Would it be fair to say that they were the wrong crowd?

A I would say so.

MR. EBERT: That's all I have.

• • •

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

* * *

Olden Bryant – Direct

[128] A 110 Roswell Drive, Kernersville, North Carolina.

Q You'd better spell Kernersville for us, if you will.

A Kernersville is spelled K-e-r-n-e-r-s-v-i-l-l-e.

Q You stated you're a Sergeant Major, United States Army, retired?

A Yes, I am, Sergeant Major, United States Army, retired.

Q Do you know the Defendant, Lonnie Weeks?

A Yes, I do.

Q Sir, how did you come to know the Defendant?

A I came to know him because he moved from up north when he was a young age of seven or eight, so I had some kids about his same age, and I got to know him through them.

By him playing with my oldest daughter, which is about his age, I grew attached to him and, after his problems with his family losing his parents, losing his father, I got more attached to him as a son I never had. I had three daughters.

Lonnie just became attached to me like one of [129] my own; and, as time went by, he stayed at my house about as much as he did his own.

Q Mr. Bryant, where did you live? If you live in Kerners – where did you live previously to living in Kernersville?

A Previously, before then, I lived 16491 Terrytown Drive.

Q Where is that in relation to where the Defendant lived when he grew up?

A That is directly in front of his house, his grandmother's house.

Q You say you took an interest in him?

A Yes, I saw a lot of potentials in Lonnie, after he had that traumatic moment with his father, and I played with him a lot. I saw a lot of potentials in him, so I kind of took up on him.

Q What kind of activities did you participate with him?

A With Lonnie, we played a lot of sports together, especially basketball and south ball. In addition to that, I had him do a few things for me around my house.

Q Sir, did you attempt to influence him to go in [130] the Army?

A Definitely. I had talked to Lonnie about joining the military a few times, and he was interested. At the same time, the potentials I saw in Lonnie going to college and his ambition for wanting to go to college, I wanted him to make his decision, his mind up which direction he wanted to go.

Q Were you concerned about Lonnie, after he graduated from high school?

A Constantly. I used to see some acquaintances that would come over and visit Lonnie and I would tell him some of the acquaintances were bad medicine, you don't need to be with this guy. They [sic] way they'd look, with my experience, you get to identify those people.

So, after Lonnie graduated, he had a little problem with a female. She had a baby for him. Lonnie was concerned about his kids. He was a kid that was from a broken home, and I guess he didn't want to see that happen to his kid, so he was a family-oriented guy, strong in that department.

Q During the time you knew him, did you ever see him get angry, commit an act of violence?

A I seen Lonnie get angry, but it was on a [131] basketball court, a sporting-type anger, getting pushed around, and that's about it, but not – not a violent type.

Q Did you ever see him swing at anybody when he got pushed around?

A Never.

Q Was he always respectful to you, sir?

A Very. Lonnie's always – he ended up all his conversations with "yes, sir" or "no, ma'am" or whoever he's talking to, around me, when I – when the wife and I talked to him. He was always very respectful.

Q Mr. Bryant, what was your reaction when you learned of this killing?

A I was totally shock. I was totally shock, and I heard the name. I was watching television. I heard the name and, when I saw the photo, I said, "This couldn't be the Lonnie that I used to know."

It really upset me, because I called the whole family in and they couldn't believe it either, that that was the Lonnie that we knew.

MR. BAKER: I'd like to consult with counsel one minute.)

(Counsel confer.)

* * *

[133] A That's correct.

Q You felt, in your judgement, with the experience that you've had in your lifetime, that the best would either be a course along the military, or perhaps a course to college?

A Correct.

Q You did everything in your power to encourage him in that regard, did you not?

A At that time, talking to him, right.

Q In fact, I think you said the last time you saw him was that in November of '92?

A Correct.

Q At that time, you encouraged him to go to college?

A Correct. We talked about – I gave him the Michael Jordan story with the support he had with his wife, because he was concerned about his child.

Q Did he indicate to you that he was going to try to pursue that?

A He said he was going to do something good and make me proud.

Q Did you know that he was on probation for conspiracy to distribute drugs at that time?

• • •

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

• • •

Trina Hammond – Direct

DIRECT EXAMINATION

BY MR. MORISSETTE:

Q Ma'am, could you state your name and address, and could you speak up so the jury can hear you?

A My name is Trina Hammond. I live at 2710 Tracy, Kansas City, Missouri 64109.

Q Trina, you're Lonnie's sister?

A Yes, I am.

Q You and he are actually half brother and sister? Is that correct?

A Yes, we are.

Q You have different fathers?

A Right.

Q Same mother?

A Yes.

Q Trina, how long have you lived with Lonnie; or, how long did you live with Lonnie when you were young?

A From birth to the age of fourteen.

Q Mr. Weeks, Lonnie's father, was your step-father?

A Yes, he was.

Q Were you close to him?

A Yes, I was.

[138] Q Do you recall his death?

A Yes, I do.

Q Do you recall Lonnie's reaction to it?

A He was – it was a loss. He was very distraught, and he –

Q Could you speak up, please?

A It was a loss to him. I was also going through a lot of stuff. We were both young, so I can't really remember a lot that he went through, a lot of withdrawal. I don't remember, we were always around each other, so –

Q Did you feel close to Lonnie?

A Yes, I did.

Q As you were growing up together?

A Yes.

Q Did you have a close relationship with him?

A Yes.

Q Now, you all moved around a little bit when you were young? Is that correct?

A Yes, uh-huh.

Q Did you start out in D.C.?

A Yes.

Q About what age did you move down to North [139] Carolina?

A I was about nine, so he was about seven and a half, eight.

Q How long did you stay down in North Carolina at that time?

A Until I was – until '82, which I was about twelve.

Q What happened? At that point, did you return to the District of Columbia for a period of time?

A Yes, we did.

Q What precipitated that move?

A My step-father's death.

Q Who in the family went back to the District of Columbia?

A Me, my mother and my two brothers.

Q The other brother is Deangelo?

A Deangelo, yes.

Q Is he about fourteen?

A Yes.

Q Now, about what age did you move back to Fayetteville?

A About sixteen.

Q You were sixteen?

[140] A I was sixteen.

Q Did your mom stay with you when you moved back?

A For – she stayed – me and – we stayed together, her and I stayed together, but my two brothers were with my grandmother.

Q Did there come a time when you and your mother also split up or moved apart?

A About a year later.

Q Do you know after Lonnie started living with his grandmother – is that Evelyn?

A Yes, it is.

Q Do you know how often he and his mother would visit?

A Not very often. I can't really say how often, but it wasn't a lot. Maybe they got to talk to each other over the phone.

Q Did his mother not being with him bother Lonnie?

A Yes, it did.

Q You are familiar with Lonnie's basketball exploits?

A Yes.

[141] Q Are you familiar with his high school involvement?

A Yes.

Q Did he ever get in trouble while he was in high school?

A Not that I can recall, he didn't.

Q How about before high school? Did he ever have any problems in school, discipline problems, anything like that?

A No, no, not really.

Q After Lonnie graduated, did you and he ever have any conversations about how he felt about his mother leaving – leaving him and eventually you?

A Yes, we did.

Q Was this after he graduated from high school?

A It was after.

Q What if anything did he tell you about that, as far as his feelings?

A He told me he was, you know, very hurt that she never made it to any of his games and that she was never around. He tried to please her a lot and she just never made it to see what he – he did, you know, what he had accomplished, and that kind of got to him over the [143] years.

Q Did he ever say anything about –

MR. EBERT: Your Honor, he's getting ready to lead to a witness; I object to that.

THE COURT: Please rephrase the question.

BY MR. MORISSETTE:

Q What if anything did he say about the relationship of his efforts in basketball and his feelings about his mother?

A He tried to be the best player he could be, and she never really recognized him for it. She never said, "You did a good job" or anything like that.

Q To your knowledge, did she ever go to any of his games?

A Not to my knowledge.

Q Did he want her to?

A Yes, he did.

Q You're living in Missouri now?

A Yes, I am.

Q How long have you been living there?

A For about five years.

Q During that five years, have you stayed in touch with Lonnie?

* * *

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

* * *

Donny M. Dees – Direct

[145] DIRECT EXAMINATION

BY MR. BAKER:

Q Sir, would you please state your full name, sir?

A Donny Michael Dees.

Q Please spell your last name for the reporter, please?

A D-e-e-s.

Q Okay, sir. Sir, what is your current address?

A 1925 Sloan Avenue, Fayetteville, North Carolina.

Q Sir, what is your profession?

A I'm a counselor.

Q Who do you work for, sir?

A I work for the public schools of Robeson County.

Q Do you know the Defendant in this case?

A Yes, I do.

Q How do you know him, sir?

A I know him through church, and from church through school, by being in education.

Q How much – what church is this, sir?

A C and Adams Street Church of God.

[146] Q Sir, how much contact did you have with him – well, let me go back. How long have you known him, sir?

A I've known Lonnie since 1979.

Q Okay. How much contact did you have with him?

A From 1979 to 1991, I served as his Youth and Christian Education Director, and his sophomore, junior and senior year in high school, I was his Sunday School teacher.

Q How often did Lonnie attend church during this period of time?

A He was a regular attender. You could almost count on him being there every Sunday.

Q Sir, how much did you – what did you talk to him about during this period? I'll ask you what kind of things did you talk about during this period?

A Of course, being in athletics myself and serving as a coach and athletic director, we had a lot in common, Lonnie being an athlete. So, we talked a lot about athletics, not only his ability, but after graduating, his potential of playing on the college level.

We would talk a lot. Me being in education, he would ask me a lot of questions about certain colleges and schools, and I would talk to him about that and try to [147] encourage him on continuing his education after high school.

Q Sir, did you observe him in church; notice anything about him?

A Sure.

Q What did you observe?

A Lonnie was very sensitive. A lot of times in Sunday School, of course, he would – he was one that would participate in class, and sensitive from the standpoint, a lot of times in class he would weep and cry over – from the standpoint of – from the lesson. It was very touching to his heart.

He made a lot of comments after class that he enjoyed the lesson; it meant a lot to him. After – a lot of times after church we would talk and communicate.

Q During the time you knew him sir, was he always respectful?

A Always. He addressed me as "yes, sir", "no, sir." I've never heard him say a harsh word or use any kind of foul language.

Q Sir, during this time, did you ever seem display any anger or –

A None, whatsoever.

[148] Donny M. Dees – Cross

Q Now, when did you start – stop –

When did you – your contact with Lonnie decrease?

A After he graduated. That August I had moved to a new church to take on a new type of ministry so, at that time, it was shortly after he graduated.

Q What year was that, sir?

A That was in 1991.

Q Sir, what was your reaction when you heard of this killing?

A I still – I couldn't believe it. A friend from the church had called. I wasn't at home at the time, and give the message to my wife.

I thought she had the wrong person, and so I naturally called the person back to try to find out the nature of the call, and was it the Lonnie Weeks that I knew, because I just couldn't believe it was the Lonnie that I had once taught and was in my Sunday School class.

MR. BAKER: Your witness.

CROSS EXAMINATION

BY MR. EBERT:

Q During his senior year in school, did he cease to be a regular attender at church or do you know?

• • •

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

• • •

Evelyn Leach – Direct

[151] Carolina.

Q Ma'am, you are the Defendant's grandmother? Is that correct?

A Yes, I am.

Q Ma'am, who is Lonnie's father?

A Lonnie's father was my son, Lonnie Weeks, Sr.

Q Ma'am, how long have you known Lonnie?

A Since birth.

Q Ma'am, did you give him a nickname?

A Yes, I did.

Q What was that?

A Man.

Q Why did you call him that?

A When he was first born and was living with me, he was kind of long, skinny and looked like a little man, so I just nicknamed him Man.

Q Ma'am, when did Lonnie's father die?

A In 1982.

Q What happened after Lonnie's father died?

A His mother moved away and went to Washington, D.C. with Lonnie and his sister and brother for awhile.

Q When did Lonnie return to your house?

A For the last time they returned in 1987.

[152] Q Okay. What happened in 1987?

A In 1987, his mother came and brought him and his younger brother to my house and left them there.

Q Could you tell how that happened?

A She just came back from Washington and came and dropped Lonnie and his brother off and –

Q Were you there?

A No, I was at work.

Q What happened? What did you discover when you got home?

A I was called – I worked eleven to seven at night, and I was called around three o'clock in the morning and was told by my daughter that my daughter-in-law had came by and dropped the boys off and said she'd be back.

Q Did she ever come back?

A No, sir.

Q How old was Lonnie, ma'am?

A Fifteen.

Q Do you know what happened to Lonnie's mother?

A After the death of my son, she got caught up in drugs because of the fact that she couldn't – she said she couldn't cope with life.

[153] Q Where is she now, ma'am?

A I really don't know.

Q Ma'am, does she know about this?

A Yes, she does.

Q She's been told?

A Well, she called when it first happened back in February, and I told her what had happened, and she had promised to come over at that time, but I never saw her.

Q Has she ever seen you since this happened?

A No, sir.

Q Now, you raised Lonnie, did you not?

A Yes, I did.

Q Ma'am, what kind of a child was he around the house?

A At my house? Like I said, I work eleven to seven at night. My husband worked three to eleven. Lonnie was no problem. I never got no calls from school, never got no calls from the principal, teachers or nobody like that about Lonnie.

He was an obedient child – for fifteen years old. He liked to clean. I never had – my house stayed clean when Lonnie was there. He liked to clean, change things around and stuff like that. Very – I mean, he was [154] just no problem.

Q Ma'am, when Lonnie went to high school, what kind – what what – let me rephrase the question.

Was Lonnie a big basketball player in high school?

A Very much.

Q You were proud of him, were you not?

A Very much.

Q Ma'am, I have some newspaper clippings here that I believe came from you. You kept these, did you not?

A Yes, we did.

MR. EBERT: Your Honor, we'll stipulate he's a basketball star. I don't know that newspaper articles concerning somebody is really relevant to this case –

MR. BAKER: Your Honor, I believe I'm allowed to have the jury consider –

MR. EBERT: – with regard to what they said, are they accurate or anything else. I assume that they are, but I don't think they have any bearing on this case.

THE COURT: I'll admit them for what they are, that's a newspaper article.

MR. BAKER: Please mark these as Defendant's

* * *

[158] identification was received in evidence.)

BY MR. BAKER:

Q Now, Ms. Leach, when did Lonnie first – let me go back a minute.

Did you go to church, ma'am?

A Yes, I do.

Q What church do you go to?

A C and Adams Street Church of God in Fayetteville, North Carolina.

Q How far is that away from your home?

A It's about eleven miles from my house; downtown Fayetteville, about – right around the corner from the Courthouse.

Q Did Lonnie go to church?

A Yes, he did.

Q How long did he continue to do that, ma'am?

A Up until he graduated from high school.

Q Ma'am, did – when did you – let me rephrase the question.

When did you first have any difficulties with Lonnie?

A Just before he finished – just before he graduated from high school, when Lonnie, I guess first [159] girlfriend, when he first found out about girls.

Q What happened then?

A Finally he move out from me and move in with his girlfriend. He was out of school then.

Q How old was he, then, ma'am?

A Nineteen.

Q Ma'am, did Lonnie – let me go back.

Ma'am, did Lonnie ever act angry or violently any time he was around you?

A No more than no – any other child would do at times when you say something to them, they might stomp or pout or walk away or something like that. Nothing – no more than that.

Q Was he always respectful to you, ma'am?

A Very much.

Q Did –

A I didn't allow no other way.

Q Yes, ma'am. Did he always work when you told him to?

A Yes, he did.

Q What year did he leave your home?

A In '90.

Q Ma'am –

[160] MR. BAKER: If I could consult with Mr. Morissette.

(Counsel confer.)

BY MR. BAKER:

Q Ma'am, what affect did you notice on Lonnie when his mother abandoned him?

A Sad and quiet a lot.

Q Ma'am, you went to all his basketball games, didn't you?

A As much as I could attend.

Q Do you know that his mother ever attended –

A No, I know she didn't.

Q Now, ma'am, what was your reaction when you heard about this killing?

A I was mad at Lonnie. I was upset. I had a lot of different emotions, but mostly I was mad at Lonnie and upset. I felt sorry for the officer's family. It's just – you really can't explain how you feel.

I couldn't believe this was Lonnie, the boy that I knew that I raised. I couldn't believe this.

Q Ma'am, you have to talked to Lonnie since this?

A Many, many times.

* * *

[164] THE COURT: That matter is resolved.

MR. BAKER: I understand you wouldn't let her testify that she has discussed religion with him, since he's been incarcerated?

THE COURT: She can testify as to anything she has said. It's what he has said that the objection is coming in. You have related to me in this Bench conference, Mr. Baker, that the only thing you're going to elicit is that she has discussed with him about religion, period.

MR. BAKER: That's it.

THE COURT: Not what anybody else said?

MR. BAKER: That's right, not his responses.

THE COURT: All right, sir.

MR. WILLETT: I don't know what she will say to him is relevant. I don't think it's mitigation to have this.

It is simply not competent character evidence because the competent character evidence is reputation evidence.

THE COURT: Counsel, I'm going to let it in. If you've got another matter, I'll hear it. Otherwise, let's proceed and go take a break.

The Court's going to take about a ten-minute break. The jury is in recess at this time; we're going to take about a ten-minute recess.

(A brief recess was taken.)

OPEN COURT

(Whereupon, the jury returned to the Courtroom and the following was had within the presence of the jury.)

BY MR. BAKER:

Q Just one more question, Ms. Leach. Since Lonnie's been in jail, you have discussed religion with him, have you not?

A Yes, I have.

MR. BAKER: That concludes my examination.

THE COURT: Mr. Ebert?

CROSS EXAMINATION

BY MR. EBERT:

Q A few questions, ma'am. Ms. Weeks – Ms. Leach, I'm sorry – how old was Lonnie when he came to live with you?

A Last time?

Q Well, yes.

A Fifteen.

* * *

 A Uh-huh.

Q What was her name, ma'am?

A Tamika. Tamika.

Q Tamika?

A I don't know her last name.

Q He fathered a child by her?

A As far as I know, she came up with this baby after Lonnie graduated from high school and said that it was Lonnie's baby, and that's all I knew, and Lonnie accepted the baby as his baby.

Q Nobody contests that, do they?

A We didn't.

Q Nobody's done any DNA or anything like that?

A We didn't, no.

Q As a matter of fact, you've provided a jury with a picture of that child likewise?

A Right, right.

Q Then, he left that child – I mean, that person, rather – and started with LaTanza?

A Ta – yeah.

Q At the time this happened, he was going with her? Is that right?

A right.

* * *

[178] law, Mr. Willett.

MR. WILLETT: Sir, I do have that aggravated battery.

(Pause in proceedings.)

THE COURT: Counsel, have you had the opportunity to look at the instructions?

MR. BAKER: Yes, sir.

MR. WILLETT: Yes, sir.

THE COURT: Is there any objections to Commonwealth's Number One?

MR. MORISSETTE: No, Your Honor.

THE COURT: Is there any objection to Commonwealth's Number Two, I believe as agreed to?

MR. MORISSETTE: That's with the fine deleted, Your Honor?

THE COURT: That's my understanding.

MR. WILLETT: Yes, that's correct.

THE COURT: Mr. Willett, you're going to provide a clean copy?

MR. WILLETT: Yes, sir.

THE COURT: I see in the first part of the instruction you're going to have to delete some, as well as where you made some delineations later in the [179] instruction, line four, five.

MR. WILLETT: Yes, sir.

THE COURT: All right, sir. Then, that will be given by agreement?

MR. MORISSETTE: Well, I believe so, at this point, Your Honor, yes.

MR. BAKER: Yes, sir. We have no objection to it.

THE COURT: All right, then, it will given by agreement. Number three, Commonwealth's Number Three?

MR. BAKER: I don't have it.

MR. WILLETT: I just gave it to you a few seconds ago.

MR. EBERT: That's the one he just handed to you.

MR. BAKER: Okay, thank you. (Counsel examines document.)

I have no objection to it.

THE COURT: All right, sir, then as to the three that have been proffered by the Defendant, A1?

MR. EBERT: Objection to that, Your Honor.

THE COURT: All right, sir.

MR. EBERT: Your Honor, that's not a correct

* * *

[183] the bare facts of the crime." They can consider what they care to consider.

The very end of it says, "However, you may not refuse to consider the evidence that has been presented in mitigation." They can accept or reject any evidence they hear, in their judgment, and I would submit to the Court the way this is written is incorrect and I'd ask the Court to deny the instruction.

THE COURT: I'm going to deny B1, Mr. Baker. If you wish to get the definition of "mitigation" or "mitigation evidence" from Black's Law Dictionary, I'll be happy to give that definition, if that's what you wish to give them is the definition.

I certainly think this goes much further than a definition and it would be confusing. So, B1 will be denied.

MR. BAKER: Your Honor, please note my objection under the Fifth, Sixth, Eighth and Fourteen Amendments to the Constitution of the United States.

Your Honor, Mr. Morissette did C1. There's an objection to that, also, so he will argue that.

THE COURT: All right, C1. Let's see if the Commonwealth wishes to object.

[184] MR. EBERT: Yes, sir.

THE COURT: State your reason, Mr. Ebert?

MR. EBERT: If it please the Court, they've already been instructed as to what they can consider and they must find an aggravating factor and/or depravity of the mind and aggravated battery before they can sentence him to death.

But this says if they fail to prove both of the aggravating factors. There can't be but – well, there may be many aggravating factors that constitute an aggravated battery, but we're talking about aggravating factors.

That's not within the standard instructions. That's not within the law. "You may give effect to the evidence in mitigation by sentencing Defendant to life in prison." That's simply not the law. They can certainly have either option, but to say that they may give effect, the way this is written, is incorrect, and I ask for it to be denied.

THE COURT: Mr. Morissette?

MR. MORISSETTE: Your Honor, the authority for the case is Penry v. Linowe (phonetic) 492 U.S. 302. That case specifically says that the jury has to be instructed [185] that, even if they find the aggravating factors, that they must be told, even if they find the aggravating factors beyond a reasonable doubt, that they have to be instructed that they can still give effect to the evidence in mitigation by sentencing the defendant to life, as opposed to death.

That instruction, required by Penry v. Linowe – it seems as though Mr. Ebert's complaint is that the instruction we propose is unartfully drafted. I would ask the Court to amend the instruction to reflect something –

Well, actually, I think there are only two aggravating factors under Virginia law, and I think the finding instructions track two aggravating factors. Maybe we can change the words somewhat in the first part of the instruction to make it clear. We may have to make the instruction longer; I don't know.

Certainly, there must be a connection, particularly giving the finding forms in this case. There is no finding form for finding either one or both of the aggravating factors beyond a reasonable doubt, and still sentencing the Defendant to life in prison.

The finding instructions, as Your Honor well [186] knows, start out with the findings beyond a reasonable doubt of one or both of the aggravating factors in consideration of mitigation evidence in the death penalty option. But, when it comes to giving effect to the mitigation evidence, it just says that, "after consideration of the evidence in aggravation and the evidence in mitigation, we sentence the Defendant to life."

So, it is not clear to the jury that, if they find beyond a reasonable doubt that the aggravating factors have been proved, that they can still chose to sentence the Defendant to life in prison, as opposed to death.

So, for those reasons, I would ask the Court to give the proffered instruction or, as an alternative, give counsel the opportunity to amend or the Court amend it to

reflect something that would more clearly convey – or, I guess, resolve Mr. Ebert's problem with the first half of that sentence.

Clearly, they must be told that, even though they find whatever aggravating factors there are beyond reasonable doubt, they can still sentence the Defendant to life in prison, as opposed to death. I believe that's [187] required by Penry v. Linowe.

THE COURT: Mr. Ebert?

MR. EBERT: If the Court – doesn't Instruction Number Two – they are told that they – after consideration of history, background, that's one predicate upon which they can fix death. Two, that the outrageous or wantonly vile, horrible, inhumane – that's another predicate.

But, if you look from there on, "If you find from the evidence that Commonwealth has proved beyond a reasonable doubt either one of the two alternatives and you are unanimous, then you may fix the punishment of the Defendant at death or, if you believe from all the evidence you believe the death penalty is not justified" – even though we've proven that – "then you shall fix the punishment of the Defendant at life."

I would submit to the Court that certainly is clear to the jury. There can't be any question that, even if the Commonwealth bears its burden, if they feel from the evidence that death should not be imposed, they can give the alternative. I think they're adequately instructed.

THE COURT: All right, thank you, counsel. C1 [188] will be denied. I think the second paragraph in

Commonwealth's Number Two, which defense counsel has agreed upon, certainly covers what you've argued, Mr. Morissette, and that it does let them know that they can sentence someone to life.

That is the option considering all the evidence, if that's what the jury believes. That is the model jury instruction. I certainly think it accomplishes what the federal law requires.

MR. MORISSETTE: Please note my objection on the grounds of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, Your Honor.

THE COURT: It will be so noted, sir.

MR. MORISSETTE: Thank you, sir.

THE COURT: Counsel, that concludes all of the proffered instructions for consideration at this time.

Mr. Willett, I believe that you're going to prepare Number Two, so there will be a clean copy for the jury?

MR. WILLETT: Yes, sir.

THE COURT: All right, sir. With that, gentlemen, then we will take an evening recess. We will

• • •

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

• • •

Lonnie Weeks, Jr. – Cross

[12] Q When was it you started selling crack cocaine?

A I never really started selling crack co – I tried to.

Q Tried to sell it?

A Yes.

Q You were unable to sell it?

A Yes.

Q Why was that?

A Because we really could never get up enough money to purchase crack cocaine to make more money to buy some more.

Q Well, now, Luther Waddell says you and he both sold crack cocaine.

A Luther Waddell – I don't understand Luther Waddell when he was up here lying the way he was. But, I can't help the way that he lied.

Q He lied?

A Yes, he did.

Q If he says that you and he were making anywhere between a hundred and fifty and two hundred dollars a day selling crack cocaine, that would be a lie?

A If I was selling – if I was making a hundred and fifty, two hundred dollars a day, I would have

• • •

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

• • •

[2] PROCEEDINGS

(Whereupon, the Court Reporter was duly sworn.)

MR. BAKER: Your Honor, I do have the instruction which you said you would allow me to prepare, with respect to mitigation, straight out of Black's Law Dictionary, and I've shown it to the Commonwealth.

THE COURT: All right, sir.

First, does the Commonwealth wish to be heard on what they propose as D-1?

MR. EBERT: I have no objection, Your Honor.

THE COURT: Let me just say, for the record, Mr. Baker, I will give your D-1 that you have proposed, or the one that you submitted yesterday, B-1. I will grant B-1, less the last sentence of B-1; so, whichever one of the two that you and Mr. Morrisette feel that you would rather have.

The Bailiff, I believe, is handing you – that's the B-1 that will be granted.

MR. BAKER: Everything except the last sentence?

THE COURT: All but the last sentence. The copy of B-1 that you have, I believe, does not have the [3] last sentence on it; the one that was omitted. Obviously, there is a last sentence there, but it's the sentence that was deleted.

MR. BAKER: Your Honor, I would prefer B-1, as you've altered it.

THE COURT: Let the record reflect then, B-1, that was submitted yesterday by the defendant, which the Court denied, will be given, less the last sentence as proposed yesterday.

Counsel, yesterday I also indicated that I would grant 1 and 3 of the Commonwealth and I still will. In reference to instruction 2 of the Commonwealth, counsel, I think that there has been an agreement to delete that portion of instruction 2 that talked about life, and a fine of up to $100,000.

The Court, after reconsideration last night, looking at the model jury instructions in the Code, I don't feel that the court is in a position to delete that. I think that it is required that it be given.

So, with that understanding, the Court is going to give instruction 2, but with the life and the fine of not more than $100,000.

At this time the Clerk is going to give you [4] the proposed copy of the verdict forms. Counsel, if you would take a moment and look at them, and be sure that there is no objection.

(Whereupon, counsel reviewed the documents.)

MR. MORRISETTE: Your Honor, I do believe we made an objection, yesterday, to the forms –

MR. EBERT: I haven't seen those before.

MR. MORRISETTE: – to the forms, collectively, on the grounds the Supreme Court case of Henry V.

Linum. We would renew that objection at this time on the grounds of the finding forms do not expressly provide for a sentence of life imprisonment, upon finding beyond a reasonable doubt, on one or both of the aggravating factors. Thank you.

THE COURT: Mr. Ebert, do you wish to respond to the objection?

MR. EBERT: Your Honor, I'd ask the Court to maintain its previous ruling.

THE COURT: All right, Sir. The Court will, as indicated before, Mr. Morrisette, I believe the second paragraph of instruction number 2, is exactly almost verbatim what you propose by way of an instruction that is [5] covered in instruction 2, that covers that very matter.

MR. MORRISETTE: Please note our exception to the Court's ruling on the –

THE COURT: It will be so noted.

MR. MORRISETTE: – on the Fourteenth Amendment to the Constitution of the United States.

THE COURT: Mr. Baker, you withdraw your D-1, since the Court has given B-1?

MR. BAKER: Inasmuch as you gave my first instruction, it is withdrawn at this time, Your Honor.

THE COURT: All right, sir. Counsel, for the record, we will be giving Commonwealth's instruction 1, Commonwealth's instruction 2, Commonwealth's instruction 3, and B-1, less the proposed last sentence.

Is there anything else counsel wishes to say concerning the verdict forms, copies of which have been given to you?

MR. BAKER: No, sir.

MR. EBERT: No.

THE COURT: At this time, then I'll ask the Bailiff to bring the jury back.

(Whereupon, at 9:10 o'clock a.m., the jury entered the Courtroom and resumed their seats in the [6] jury box.)

THE COURT: You may have a seat, if you would, please.

(Whereupon, the jury complied with the request.)

THE COURT: Good morning again, ladies and gentlemen. Yesterday, when we ended our evening recess, I gave you an instruction. I asked you please do not discuss this case with anyone, or receive any information about the case.

Let me simply ask you again, for the record, have any of you received any information about this case from any source, other than in the Courtroom; or have you discussed this case with anyone other than in the jury deliberation room?

THE JURY: (Answer negatively.)

THE COURT: Ladies and gentlemen, at this time, the Court is going to read you certain instructions. Again, I will ask you to please listen carefully as these instructions are read to you.

Copies of the instructions will be given to you for you to take back to the jury deliberation room, as will the Exhibits that have been placed into evidence.

* * *

---

(6) No. 99-5746

FILED
OCT 13 1999
CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX
VOLUME II, PAGES 189 TO 378

ROBERT H. ANDERSON, III, ESQ.
Assistant Attorney General
Counsel of Record
Supreme Court Building
101 North Eighth Street
Richmond, VA 23219
(804) 786-4624

Counsel for Respondent

GLEN A. HUFF, ESQ.
TIMOTHY M. RICHARDSON, ESQ.
Counsel of Record
HUFF, POOLE & MAHONEY, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
(757) 499-1841

STERLING H. WEAVER, SR., ESQ.
P.O. Box 543
Portsmouth, VA 23705
(757) 393-0237

MARK EVAN OLIVE, ESQ.
LAW OFFICES OF MARK E. OLIVE, P.A.
320 West Jefferson Street
Tallahassee, FL 32301
(850) 224-0004

Counsel for Petitioner

Petition For Writ Of Certiorari Filed On August 16, 1999
Certiorari Granted On September 1, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

194 pp

TABLE OF CONTENTS

Page

Volume I

Lower Court Docket Entries 1

Defendant's Proposed Voir Dire Questions filed 10/8/93..... 9

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/15/93..... 13

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/18/93..... 17

Defense Exhibit B filed 10/18/93 66

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/20/93 Testimony of Luther J. Waddell..... 72

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/20/93..... 80

Guilt Phase Verdict Form Filed 10/21/93 84

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/21/93..... 85

Testimony of M. W. Casey..... 89

Testimony of Ralph Marshall 94

Testimony of Jeanette A. Galbraith..... 97

Testimony of Douglas Buchanan 100

Testimony of Linda Cavazos..... 102

Testimony of Lonnie Weeks, Jr..... 104

Testimony of Bennie House..... 130

Testimony of Tony McBride..... 136

TABLE OF CONTENTS – Continued

Page

Testimony of Sean Beaman 139

Testimony of Renee Rogers 142

Testimony of Juaneza Vivian..... 145

Testimony of Olden Bryant 151

Testimony of Trina Hammond 156

Testimony of Donny M. Dees..... 162

Testimony of Evelyn Leach 166

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/21/93 Testimony of Lonnie Weeks, Jr. 182

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/22/93..... 184

Volume II

Instruction No. B1-Denied 189

Instruction No. C1-Denied 190

Instruction No. 1-Granted..... 191

Instruction No. 2-Granted..... 192

Instruction No. 3-Granted..... 194

Instruction No. B1-Granted 195

Sentencing Verdict Forms..... 196

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/22/93..... 199

Jury Questions filed 10/22/93 217

TABLE OF CONTENTS – Continued

Page

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 10/22/93..... 218

Sentencing Verdict Form filed 10/22/93..... 228

Transcript of Hearing before the Honorable Herman A. Whisenant, Jr. on 1/13/94..... 229

Assignments of Error and Designation of Record filed in the Supreme Court of Virginia..... 232

Motion to Exceed Page Limit for Brief filed in the Supreme Court of Virginia on May 11, 1994 240

Brief Filed with the Supreme Court of Virginia in Non-Compliance with Page Limit on May 11, 1994..... 242

Order from the Supreme Court of Virginia Denying Motion to Exceed Page Limit for Brief entered May 27, 1994..... 247

Assignments of Error and Questions Presented from the Brief Filed with the Supreme Court of Virginia in Compliance with Page Limit..... 248

Statement of Facts From Brief Filed with the Supreme Court of Virginia in Compliance with Page Limit... 265

Principles of Law, Argument, and Authorities From Brief Filed with the Supreme Court of Virginia in Compliance with Page Limit..... 267

Weeks v. Commonwealth, 450 S.E.2d 379 (1994) 272

Petition for Writ of Habeas Corpus filed in United States District Court for the Eastern District of Virginia on 2/7/97 297

Brief of Appellant filed in United States Court of Appeals for the Fourth Circuit on 10/13/98 304

TABLE OF CONTENTS – Continued

Page

Appellant's Reply Brief filed in United States Court of Appeals for the Fourth Circuit on 12/17/98... 315

Motion to Recall Mandate filed in United States Court of Appeals for the Fourth Circuit on 7/22/99..... 323

Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999) 327

Order From United States Supreme Court Granting Leave to Proceed In Forma Pauperis..... 378

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

[Instruction Denied By Court]

JURY INSTRUCTION B1

EVIDENCE IN MITIGATION

Mitigation evidence is not evidence offered as an excuse for the crime of which you have found defendant guilty. Rather, it is any evidence which in fairness may serve as a basis for a sentence less than death. The law requires your consideration of more than the bare facts of the crime.

Mitigating circumstances may include, but not be limited to, any facts relating to defendant's age, character, education, environment, life and background, or any aspect of the crime itself which might be considered extenuating or tend to reduce his moral culpability or make him less deserving of the extreme punishment of death.

You must consider a mitigating circumstance if you find there is evidence to support it. The weight which you accord a particular mitigating circumstance is a matter of your judgment. ~~However, you may not refuse to consider the evidence that has been presented in mitigation.~~

[Last Sentence Deleted By Trial Court Judge]

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

[Instruction Denied By Trial Judge]

JURY INSTRUCTION C1

Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the Defendant to life in prison.

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

INSTRUCTION NO. 1

You are the judges of the facts, the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

INSTRUCTION NO. 2

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than $100,000.00. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

INSTRUCTION 3

"Aggravated battery" means a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

JURY INSTRUCTION B1

EVIDENCE IN MITIGATION

Mitigation evidence is not evidence offered as an excuse for the crime of which you have found defendant guilty. Rather, it is any evidence which in fairness may serve as a basis for a sentence less than death. The law requires your consideration of more than the bare facts of the crime.

Mitigating circumstances may include, but not be limited to, any facts relating to defendant's age, character, education, environment, life and background, or any aspect of the crime itself which might be considered extenuating or tend to reduce his moral culpability or make him less deserving of the extreme punishment of death.

You must consider a mitigating circumstance if you find there is evidence to support it. The weight which you accord a particular mitigating circumstance is a matter of your judgment.

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

_____

FOREMAN

_____

PRINT FOREMAN'S NAME

Commonwealth of Virginia

vs.

Lonnie Weeks, Jr.

Criminal Number 33170

October 22, 1993

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that

would constitute a continuing serious treat [sic] to society,

and

having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind and/or aggravated battery and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

_____

FOREMAN

_____

PRINT FOREMAN'S NAME

Commonwealth of Virginia

vs.

Lonnie Weeks, Jr.

Criminal Number 33170

October 22, 1993

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having considered all of the evidence in

aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

FOREMAN

PRINT FOREMAN'S NAME

Commonwealth of Virginia

vs.

Lonnie Weeks, Jr.

Criminal Number 33170

October 22, 1993

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life and a fine $_____.

FOREMAN

PRINT FOREMAN'S NAME

Commonwealth of Virginia

vs.

Lonnie Weeks, Jr.

Criminal Number 33170

October 22, 1993

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

* * *

[8] accordingly.

Now, ladies and gentlemen, you have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life, or to imprisonment for life and a fine of a specific amount, but not more than $100,000.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt, at least one of the following two alternatives: one, that, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or two; that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhumane, in that it involved depravity of mind and aggravated battery to the victim, beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death; or, if you believe from all the [9] evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment, or imprisonment for life and a fine of a specific amount, but not more than $100,000.

If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment, or imprisonment for life and a fine of a specified amount, but not more than $100,000.

"Aggravated battery" means a battery which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder.

Now, mitigation evidence is not evidence offered as to an excuse for the crime of which you have found the defendant guilty, rather, it is any evidence which in fairness may serve as a basis for a sentence less than death.

The law requires your consideration of more than the bare fact of the crime.

Mitigating circumstances may include, but are not to be limited to; any facts relating to the defendant's age, character, education, environment, life and background, or any aspect of the crime itself, which [10] might be considered extenuating or tend to reduce his moral culpability, or make him less deserving of the extreme punishment of death.

You must consider a mitigating circumstance if you find there is evidence to support it. The weight which you accord a particular mitigating circumstances, [sic] is a matter of your judgment.

Mr. Willett?

MR. WILLETT: Your Honor, with the Court's permission I'd like to give the opening portion, and Mr. Ebert would like to reply.

THE COURT: All right, sir.

MR. WILLETT: Thank you.

THE COURT: Thank you.

MR. WILLETT: When a crime so singular and profound, such as this, has been executed, and the last shot has echoed into the dark coldness, the effects of that crime ripple from that place of death, like the waves of an earthquake from its epicenter.

Those waves have rippled through and destroyed countless lives.

The victims of Lonnie Weeks' crimes are nameless and they are faceless. They are the young people [11] to whom he sells drugs in North Carolina; they are the State Troopers who are here and who are on the streets, even now, for our protection, who have been profoundly and deeply damaged by the acts of the defendant.

His victims fill this Courtroom, on both sides of the isle. No one, more deeply damaged then Mrs. Cavazos and Ms. Leach.

And what is his reason for doing this? Why did this happen? That is the question which pierces this trail like the blade of a knife.

Why did he have to do it? Why didn't he just get out of the car when Jose Cavazos politely asked him to do so, leaving the gun there?

Why didn't he say to him, Trooper, there's a gun in the car, and I know I'm not supposed to have it? Why did he fire upon him?

Is the answer because an evil spirit had taken over him, or is the answer that he acted as he has always acted, since he left the good influences of his grandmother; in his own, selfish interest?

Did he take the life of Jose Cavazos because he was possessed demonically, or was it because he was riding in a stolen car, because he had committed burglary, [12] because he had a weapon that had been used in a murder with him, and because he knew he was violating his probation?

The answer to the question, ladies and gentlemen, is clear. He killed Jose Cavazos because it was good for him to do it. It would help him, or so he thought, and no other reason.

And it is because of that, that the death penalty is the only appropriate sentence in this case.

If he had gotten on the witness stand and told you the truth, perhaps a life sentence would be appropriate. Him getting on the witness stand was a very shrewd defense tactic. You had found him guilty of capital murder. You are saying to him, we are convinced beyond all reasonable doubt that you committed this crime.

He's got nothing to lose by getting on the witness stand, after that, and saying, sure, I did it, and here's how it happened, and here's why it happened, and I'm deeply sorry for what happened.

But even yesterday, when he was cross-examined by Mr. Ebert, he couldn't face you with the truth. He told us he wasn't going to shoot Detlow. He was going to wait for the drug dealer Detlow to shoot at him, first.

• • •

[14] than there is in it.

There is panic and fear all around, and he stops to pick up and examine a piece of paper.

An evil spirit took over me. Why couldn't he tell us the truth yesterday? If he wants mercy, and his lawyers are going to use that word, shouldn't he be truthful with us first?

What happened? They came down this road, and you know (indicating) they came up this ramp, and the killing took place, and who drove away? That man (indicating). That was the man that had the presence of mind to drive away, not Mr. Dukes.

And up they came, when all of a sudden they've got a big problem, because there are two documents at that scene, we now know from his testimony, which can identify them.

Mr. Dukes' driver's license, and the paper – we still don't know what that paper is – that Mr. Dukes reached over and took out of the glove compartment, and gave to the Trooper. Both of those are on the ground back at the scene.

And so, Mr. Weeks stops the car. He takes the gun which he can't keep on his person anymore, because we

• • •

[16] arrive, and you heard the testimony. Police were being sent up in all different directions. The more the Police came on the scene, the more he had to secret himself, and so he did, back through the woods.

If it were not for Officer Virgil, they would have gotten back in that car, and they would have been gone, and we would never know who killed Jose Cavazos.

Do not think for a minute that he was truthful with you when he told you that he went back there to help. He went back there for the same selfish reasons that he's done everything since leaving Ms. Leach's home.

Why did he sell drugs? Well, he says it was for his children. Why didn't he get a job and keep it? He told Mr. Ebert he left all the jobs that he had, voluntarily.

If he is such a good family man interested in his children, why does he impregnate one woman, leave her; impregnate another one, leave her; start dating the third, no child support, except monies here and there, didn't marry. Self-interest; lies.

And because of that, because he would come into this Courtroom, and still calculate, and still play on emotions, and still cover up evidence, then he is the [17] type of person who is so dangerous that the death is warranted for that.

Look at the opportunities he's had in his lifetime. The defense, in their opening, portrayed him as coming from a disadvantaged background, and that is true. But it was a background with character, a background really, that while not having the financial support that it should have had, was as fine a home as any of us grew up in.

Mrs. Leach gave him the things he needed as a young man; love, faith, support. His actions betrayed her as they do Mrs. Cavazos.

He had the support of the mentor across the street, Sergeant Major Retired, a fine man, a man who cared about him. He had a coach who cared about him. He had a sister who cared about him, and by the way, why isn't she a criminal? If his background caused him to be a criminal, why isn't his sister a criminal? Why is she an upstanding citizen?

The coach, Sunday school counselor. All the fittings to nurture a heart were there for him, and don't let the defense tell you because he grew up poor, that that is an excuse for what he did.

[18] Most poor people, almost all poor people, believe in the law and support it, and they don't break it.

If his poverty is an excuse for his crime, then our system of justice needs to be changed.

Judge Whisenant has told you something about the law which we will get to very briefly, but I want to touch on all the mitigation evidence that you've heard about what he was like as a young man; a basketball star, there were pictures – they even introduced pictures of his children. We could have introduced pictures of Jose's children, too, but that's not what this case is about.

All of these people told you what he was like when he was young. None of them could tell you what he was like now, and I was struck by the similarity of the statements which the different witnesses made.

Ms. Vivien said, when she learned about the offense which Mr. Weeks had executed, "This couldn't be the Lonnie I used to know."

Donnie Reece, from his church, said, "I couldn't believe it was the Lonnie I once taught in Sunday school." Perhaps, most tragically, Mrs. Leach said, "I couldn't believe this was Lonnie, the boy I knew, that I [19] raised."

The boy that she knew and she raised is no longer among us. He disappeared many years ago, and he has been replaced by a man who would commit a crime such as this.

The law Judge Whisenant has told you about. The Commonwealth has to establish to your satisfaction either one of two things.

First, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

His testimony yesterday, his deviousness, and his purpose, which was to mislead you, is the most compelling evidence of his continued threat to society.

Forget all the crimes he's committed in the last – well, he's only been out of High School for a couple of years, a year and a half, but look what he's done.

He's been busy. He's done just about every crime you can think of, with the exception of rape. Is there anything that is beyond him? Can you think of a crime that this man would not commit, given the year and a

* * *

[22] about the trial, and pretends it just didn't happen.

He wants one thing; he doesn't want his father's death to be a waste.

I say to you, ladies and gentlemen, that if you take this opportunity to let them know that you're behind them, then his death will not have been a waste, and we can say there was some good which came from it.

Mr. Ebert and I ask you to impose the most serious penalty that the law allows, for this most serious of crimes.

Thank you, very much, for your kind attention throughout this long trial.

THE COURT: Thank you, very much.

Mr. Baker?

MR. BAKER: Ladies and gentlemen of the jury, I stand before you, in this most important matter, to argue that my client should receive a penalty of less than death, because that's what this trial has boiled down to; life or death.

Now, ladies and gentlemen of the jury, Mr. Willett has alluded in his opening statement the things that I am supposed to say here.

Well, ladies and gentlemen, some of these

* * *

[37] The defendant tried to explain this, that the only reason that he could understand why he did this thing, is that he got out of touch with God, and that's all he could explain how he could commit these evil acts.

Now, this defendant, ladies and gentlemen, is deeply – was religious, and I believe is now. He's tried to explain that the only reason that he can understand that would cause him to do these things.

Now, how do you know he was deeply religious? You got the testimony of Mr. Bedes, who was the Sunday school teacher, saying that he became moved so much in church that he had occasion to cry because of the Scripture.

Now, the defendant says he got out of touch with the Lord, and that was the result. I think, ladies and gentlemen of the jury, there was some justification for the defendant saying that. You have evidence before you that this man regularly attended church. He did so up until he graduated from High School.

You have evidence that he was sincere when he went to church. You have evidence that this individual grew up in a neighborhood that was not the best.

From the testimony of the detective, or I [38] believe the investigator, Narcotics Investigator from Fayetteville, this is a terrible area. There is drugs, there is shootings.

Now, the defendant lived there. He went to church, and he stayed out of trouble as long as he went to church. That's uncontested.

So, if there ever was an advertisement for church attendance, probably this case is it, because this defendant, as long as he went to church, he could resist the temptations around him.

We've heard all kinds of testimony concerning this neighborhood that he lived in, and yet, until he got

arrested for marijuana, after he graduated from High School, the defendant had no prior record.

Now, he got on the stand. He's told you that if he could die and bring Trooper Cavazos back from death, he would do it. Then he put a provision, which of course the Commonwealth will bring up, if he could go to heaven.

Now, perhaps it would have been much better, and much more self-serving, for this defendant to tell you, well, I'd die to bring him back, if I could bring him back, even if I went to hell. He's a Christian, and he can't say, but that was the truth as he saw it.

* * *

[40] old. His twenty-first birthday came, I believe, in July of this year, after this, making him twenty years old at the time he committed this offense.

Now, for eighteen years this defendant lived a very good life, considering the neighborhood that he grew up in, considering the temptations that he was faced with, he stayed out of trouble.

I would submit to you, from all the testimony that you heard, where he grew up, he was an exception to the rule.

Then what happened? Well, he went away from the church, and he went away from school, and he started hanging around with the wrong people. Now, that doesn't justify this. It doesn't justify it at all, because everybody has the right to make that decision. He had the right to make the decision who he hung around with.

However, he hung around with people like Luther Waddell, and as the retired Sergeant Major, Mr. O'Brien testified he tried to get him out of there.

Mr. Willett stated, quite correctly, that the defendant did have people that cared about him. He did. He had a grandmother that raised him and his brother, and worked hard all her life.

[41] Mr. Willett also said, and we don't disagree about this, how she feels. She got on the stand. She told you that she felt angry when she learned this had happened.

However, one thing in Lonnie Weeks' life did happen to him, and that was he was abandoned by his mother, who left him and his brother at the house of his grandmother and left, abandoning him.

The testimony is his mother is a drug addict. She wouldn't even bother to come by and see him. The testimony from his sister, no matter how good that he did, how outstanding a basketball player he was, his mother wouldn't even come to see his games.

The testimony from his grandmother was that his mother knows about this, and she hasn't even bothered – hasn't even bothered to come by the house, even though she knows her son is on trial for his life.

She did not appear as a witness. As his grandmother said, she can't be found.

Well, I submit to you, ladies and gentlemen of the jury, that it did have an impact on this defendant.

Now, we brought in a lot of witnesses, and the Commonwealth has alluded to this. Everyone of those [42] witnesses testified they never knew Lonnie to commit a violent act, never knew him to get in fights, and that they were totally shocked, totally shocked when they learned about this.

All of them came up here from North Carolina to give testimony in his trial, knowing what he had done.

The papers will show that Lonnie Weeks was an athlete of considerable promise, all of which has been totally wasted by him. Totally wasted; it's absolutely terrible.

Now, ladies and gentlemen of the jury, there can be no justification for murder. There can particularly be no justification for the murder of a State Trooper; however, when you decide on your sentence in this case, you do have two alternatives; life or death.

I would ask you to consider that for eighteen years this was a pretty decent person, that he stayed out of trouble for that long, under difficult circumstances.

Then, as he said, he got out of touch with the Lord, and he is a religious man. There are many who find religion in the jail. They become converted prior to coming to Court, prior to sentencing. Then they usually leave it after sentencing.

[43] Lonnie Weeks is not such a person. He had a religious background, and he was deeply moved. He has sinned. He has sinned. He does not deny that he has sinned, grievously, he has sinned.

He believes that if his soul is right he might go to heaven and that's what he wants. Now, ladies and gentlemen, I submit to you that is really what the Christian religion is about.

The Commonwealth had alluded to you, in order to sentence this – fix this defendant's sentence of death, you must find two things, and that is that –

MR. WILLETT: Excuse me, Judge. I hate to interrupt, but it would be either one of the things, not two things.

MR. BAKER: You're correct, Mr. Willett.

MR. WILLETT: Thank you.

MR. BAKER: I made a mistake. There are two factors you can consider, either one of which would justify a death sentence, and that is after considering his criminal history and background, there is a probability that he would constitute a continuing serious threat to society.

Or, that his conduct in committing the offense [44] was outrageously wanton and vile, or inhumane, it involved depravity of mind, or aggravated battery to the victim, beyond the minimum necessary to accomplish the act of murder.

Prior to this offense, the defendant had one conviction. Now, he committed a bunch of other offenses, and you can consider that. Now, you could still find that he meets both of these criterias, and not sentence him to death.

I believe you will read that in the instructions. Now, ladies and gentlemen, I stand before you, humbly. This defendant admits that he has committed a terrible crime. He has admitted that he has killed an innocent man. He has tried to tell you, although the Commonwealth will say it's a bunch of self-serving lies, what happened.

Now, ladies and gentlemen, he never said, an evil spirit. He tried to explain, but that was the Commonwealth's words. That was not his.

When he was being asked he tried to explain something that he has great difficulty in his own mind explaining, and I hope you understand that when you decide.

[45] You saw him on the stand, ladies and gentlemen, you saw him. I submit to you, ladies and gentlemen, you have a person who is repentant. You have a person that is trying to find God again, although this is a terrible thing to have to do, under the circumstances.

And, again, ladies and gentlemen of the jury, the issue is whether you should sentence this defendant, Lonnie Weeks, Jr., to death, or you feel from the evidence, and the Judge has given you an instruction with respect to what you can consider, that he deserves the other alternative, which is life.

Ladies and gentlemen of the jury, I want to thank you for your attention, before I leave, and I pray, ladies and gentlemen of the jury, that you will return a sentence of life in this case.

Thank you.

THE COURT: Thank you, Mr. Baker. Mr. Ebert?

MR. EBERT: Ladies and gentlemen, it's been a long week for you, and for all of us, and I know it's been a real strain. Again, I want to thank you for being here, and for being so attentive to the evidence that you've heard.

What I say to you, as counsel told you, is not [46] evidence. You've heard the evidence and you folks are going to have to determine what the appropriate punishment is in this case.

I take no pleasure in asking you to impose the death penalty. We have the death penalty and you don't have to impose it, but all of you have taken an oath that you can consider both options.

I would say to you folks that if you're going to have the death penalty, this case is the type of case that it's designed for. Now, why do I say that? Because we have to look at the defendant as you saw him today, and as he was on the day that this crime was committed.

There is no question about the fact, back when he was in High School, there is no evidence before you, that he was dangerous, that he had turned to a life of crime. That's not what we're dealing with here, folks. You're dealing with what we've got here today.

It's been pointed out earlier; he had every advantage – I won't say, every advantage, but many advantages that other people don't have. Sure, his parents – one died and the other one left him. One was a drug user, couldn't stand it, according to his grandmother, but this man didn't use drugs. This man sold [47] drugs for profit. That

is the testimony and it's uncontradicted testimony before you. This man is greedy. This man is selfish.

That's what you have before you. He told you; he wanted money, and that's why he did what he did. That's why he sold drugs, that's why he broke in Mr. Farmer's house, that's why he stole his car.

Everything that he has done throughout this trial, I would submit to you, is an attempt to mitigate what might happen to him. He lied from the onset, throughout, to the Officer. And why? Because he was selfish and he didn't want to get caught and he didn't want to admit it.

Once he got – he felt that the evidence was overwhelming, he changed his story a little bit. Then, he got on the stand yesterday, folks, and he told you certain things for one reason and one reason alone, and that was to mitigate the punishment that you're entitled to impose on him, that you've sworn to consider, under the law.

I say to you if you believe what he said on the stand yesterday, sentence him to life. If you don't, and you believe that the type of person that he is, that he was trying to serve himself, I say sentence him to [48] death, but you folks be the judge of that.

Counsel says to you there is no evidence that he murdered anyone in North Carolina. There is not, but he knew that gun had been used in a murder. He had already turned to a life of crime. He wanted a gun, and he got that gun in order to aid the person who had been suspected of the murder, and did not want that weapon in their possession.

And he got it for the purpose of killing another human being. That's why he had it. He tells you, I didn't reload it, Luther Washington (sic) reloaded it. He knew Luther Washington reloaded it, and he knew how many shells and bullets were in that gun. He knew what hollow bullets were. He knew what a 380 was.

He'd tell you, well, I really wasn't going to kill Detlow, unless he tried to kill me. That's not what Luther Washington said, and in any event, he armed himself, as it was pointed out to you, if he wasn't selling drugs, he wouldn't have gotten involved with Detlow to start with, and he wouldn't need to have that gun.

If he weren't going to kill Detlow or use it to take another person's life, why are they passing it

* * *

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

[Questions And Answers Handwritten In Original]

Question: (1) Does the sentence of life imprisonment in the State of Virginia have the possibility of parole and if so under what conditions must be met to receive parole.

Answer: You should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

Question: If we believe that Lonnie Weeks, Jr., is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? or must we decide (even though he is guilty on one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule please clarify.

Answer: See second paragraph of Instruction #2 (Beginning with "If you find from. . . .

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

• • •

[56] It dwelt within him when he sold drugs. It dwelt within him when he broke in a helpless man's home and took his belongings. It dwelt within him with he took his car.

Luther Washington (sic) told you why he was going to Washington, to sell it; and I say that's credible.

Now, what's incredible, to me, and you be the judge of it; he tells you, I'm going to bring the car back and park it. The man stole everything he had inside and ransacked the house, he's going to sell the television, stereo, get the money that he wanted so badly, and he says, oh, I'm going to take it back. I was just taking it for a little joyride, up to visit my relatives.

Folks, I say that's baloney. That's the person you're dealing with.

Everything he does is calculated for his self interest. What so tragic about it, and God knows nobody likes to come out of poverty. He didn't have to be that way. He had jobs. The system, the judicial system such as we've had, gave him an opportunity; putting him on probation.

And the Judge, no doubt, heard every word you heard yesterday in mitigation, what a nice fellow he was,

• • •

[59] Thank you.

THE COURT: Thank you, Mr. Ebert.

Ladies and gentlemen of the jury, at this time you will be given the instructions that I have read to you, the Exhibits that have been placed in evidence, and you may and begin your deliberations.

Please go with the Bailiff at this time.

(Whereupon, at approximately 10:40 o'clock a.m, the jury retired from the Courtroom to begin their deliberations.)

THE COURT: The Court will be in recess until the jury returns.

(Whereupon, the Court stood in recess until 12:00 p.m.)

THE COURT: Counsel, I have received a question from the jury. The question is, "Does the sentence of life imprisonment in the State of Virginia have the possibility of parole, and if so, under what conditions must be met to receive parole?"

I have responded by saying, "you should impose such punishment as you feel is just under the evidence, and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards."

[60] MR. BAKER: Your Honor, I'll object to that instruction, and I would request instruction with respect that they should presume that their sentence will be carried out.

THE COURT: I'll deny that request. This is the standard instruction that is to be given to the jury from the model jury instructions. Your exception will be noted.

Mr. Ebert, do you want to be heard?

MR. EBERT: Counsel, that's simply not the law. It would be improper to instruct them that they should presume that their sentence would be carried out. If they, in fact, would sentence him to life, he would be eligible for parole, so if that's the standard instruction, I ask the Court to give it to them.

THE COURT: All right, sir.

MR. BAKER: Note my objection, please, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution.

THE COURT: They will be so noted, and as Mr. Ebert has indicated, I don't think one; that's the law, and two, that's certainly not the model instruction that should be given.

[61] The Court will be in recess until the jury returns.

(Whereupon, the Court stood in recess.)

(Whereupon, at approximately 12:40 o'clock p.m., the jury entered the Courtroom and resumed their seats in the jury box.)

THE COURT: You may have a seat, if you would, please, ladies and gentlemen.

(Whereupon, the jury complied with the request.

THE COURT: Ladies and gentlemen, I called you back just to simply advise you that the Court is going to be taking a one-hour luncheon recess. It's twenty minutes to one.

The reason I am doing that is I have a two o'clock docket that I must meet this afternoon. Now, if you wish to go to lunch you may. I've been advised that someone has indicated to the Bailiff that you may wish to continue with your deliberations during lunch.

You certainly may do that, as well, but I also was advised that you would like to have some drinks, and send someone down for drinks and coffee. That's fine also. Just remember, you may not do any deliberation [62] unless all of you are in the deliberation room at the same time, so if one or two of you, or three of you go down to get coffee and drinks, and you wish to deliberate straight through lunch, that's certainly fine, as long as there is no deliberation by any of you, and no discussions whatsoever, unless all twelve of you are in the jury deliberation room at the same time.

The Court is going to take luncheon recess. It's twenty minutes to one. I'll be back at twenty minutes till two. As I said, I have a two o'clock docket; however, if there are any questions that you may have, or any reason, I'll certainly be responding to them immediately.

I will stop my two o'clock docket to accommodate whatever I may have to with you, but I do want you to know that we are going to lunch. If you wish to go to lunch that's up to you.

I understand that you may not, from what the Bailiff has indicated, but I will let the jury make that decision. So, at this time, the Court is in recess for one hour.

Let me simply advise you that if you do go to lunch, apart from those of you who may go downstairs to [63]

get coffee or drinks, or whatever, please do not discuss this case with one another unless all of you are in the jury deliberation room deliberating.

Please do not stay within the hearing of anyone that may be discussing this matter. If you do decide to deliberate straight through, and you're just going to send one or two of you downstairs, the Bailiff will assist the individuals going down, so that you can get downstairs, get what you would like, and then get on back here. He will assist you.

So, at this time you may go with the Bailiff back to the deliberation room, or go to lunch, whatever you decide to do at this particular time.

(Whereupon, at approximately 12:45 o'clock p.m., the jury retired from the Courtroom.)

THE COURT: Counsel, the Court will be in recess until twenty minutes to two.

(Whereupon, the Court stood in recess until approximately 3:15 o'clock.)

THE COURT: Counsel, I have received a question from the jury. The question is as follows: "If we believe that Lonnie Weeks, Jr., is guilty of at least one of the alternatives, then it is our duty as a jury, to [64] issue," – and they have underlined the word, "issue," – "the death penalty? Or, must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty or one of the life sentences? What is the rule? Please clarify."

In instruction number 2 that was given to them, in the second paragraph, it reads, "If you find from the

evidence that the Commonwealth has proved, beyond a reasonable doubt, either of the two alternatives, and as to that alternative, you are unanimous, then you may fix the punishment of the defendant at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at imprisonment for life, or imprisonment for life with a fine not to exceed $100,000."

I don't believe I can answer the question any clearer than the instruction, so what I have done is referred them to the second paragraph of instruction number 2, and I told them beginning with, "if you find from," et cetera, et cetera, for them to reread that paragraph.

Does either counsel wish to be heard?

MR. EBERT: I think that's appropriate, Judge.

[65] MR. MORRISETTE: Could we just have a moment?

(Pause)

THE COURT: Counsel do you wish to be heard?

MR. MORRISETTE: Your Honor, we would ask that Your Honor instruct the jury that even if they find one or both of the mitigating factors – I'm sorry, the factors that have been proved beyond a reasonable doubt, that they still may impose a life sentence, or a life sentence plus a fine.

THE COURT: That's exactly what that paragraph does, counsel. You're just asking me to rephrase it in different language, and to give the same instruction

again. I do not think that would be appropriate to give the same instruction twice, just with different language.

I think that paragraph answers their precise question. I think they just have to be drawn to that paragraph to find their answer.

MR. MORRISETTE: Please note my objection, Your Honor.

THE COURT: It will be so noted.

The Court will be in recess until the jury returns.)

(Whereupon, the Court stood in recess.)

[66] THE COURT: Counsel, we have a verdict in this matter. The jury is coming back.

(Whereupon, at approximately 5:31 o'clock p.m., the jury entered the Courtroom and resumed their seats in the jury box.)

THE COURT: You may have a seat, if you would, please. (Whereupon, the jury complied with the request.).

THE COURT: At this time I will please ask the Clerk to read the verdict.

THE CLERK: Members of the jury, have you reached a verdict in the case?

FOREPERSON: Yes, we have, Your Honor.

THE CLERK: Is this your unanimous vote?

FOREPERSON: Yes, it is.

THE CLERK: In the case of Commonwealth of Virginia versus Lonnie Weeks, Jr., Criminal Number

33170, we the jury, on the issue joined, having found the defendant Lonnie Weeks, Jr., guilty of capital murder, and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhumane, in that it involved depravity of mind and or [67] aggravated battery, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death, signed David L. Dobyns, Foreman.

MR. MORRISETTE: Please poll the verdict – poll the jury.

THE COURT: At this time I will ask the Clerk to please poll the jury.

THE CLERK: As I call your name, members of the jury, please answer yes or no, as to your verdict in this case.

Jessica L. Nelson?

(Whereupon, a majority of the jury members are in tears.)

MS. NELSON: Yes.

THE CLERK: Joann Chappell?

MS. CHAPPELL: Yes.

THE CLERK: Brenda Barrett?

MS. BARRETT: Yes.

THE CLERK: Charlene Rogers?

MS. ROGERS: Yes.

THE CLERK: David Dobyns?

MR. DOBYNS: Yes.

THE CLERK: Thaddeus Trynock?

[68] MR. TRYNOCK: Yes.

THE CLERK: Sherrie Richardson?

MS. RICHARDSON: Yes.

THE CLERK: Juanita C. Ford?

MS. FORD: Yes.

THE CLERK: Beatrice Hayward?

MS. HAYWARD: Yes.

THE CLERK: Sandra E. Willis?

MS. WILLIS: Yes.

THE CLERK: Kent Painter?

MR. PAINTER: Yes.

THE CLERK: Thomas Boyer?

MR. BOYER: Yes.

THE COURT: Ladies and gentlemen, let me thank you for the time and effort that you've put into this matter. You are excused from any further jury duty for this term. At this time, if you will please go with the Bailiff.

(Whereupon, at approximately 5:30 o'clock p.m., the jury retired from the Courtroom.)

THE COURT: Any motions by counsel?

MR. BAKER: There would be a motion for a pre-sentence report.

• • •

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind and/or aggravated battery and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

DAVID L. DOBYNS
FOREMAN

/s/ David L. Dobyns
PRINT FOREMAN'S NAME

Commonwealth of Virginia
vs.
Lonnie Weeks, Jr.
Criminal Number 33170

October 22, 1993

PRINCE WILLIAM COUNTY CIRCUIT COURT

[Caption Omitted In Printing]

• • •

[37] least as far as what the Court heard in the penalty phase witnesses, none of it had anything to do with the aggravated battery and depravity of mind vis-a-vis should the death penalty be imposed.

In mitigation, the defendant offered several witnesses, and I would just like to very briefly recount their testimony, which I believe, is substantial mitigation testimony, justifying a sentence of life in this matter.

If you recall, Coach House testified that he had coached Lonnie at Seventy First for, I believe, three years, that Lonnie always maintained control of himself. He never had any disciplinary problems with him. He was a leader on the team, and attempted to be an example to the younger players, that he never had been thrown out of a game for any reason, and to his knowledge, had not been in trouble in school.

He also testified that he noticed Lonnie, apparently, did have problems once he graduated. Coach House did not have regular contact with him, when Lonnie lost that regular contact with Coach House.

Sergeant Major Bryant had a very similar account, although he didn't coach Lonnie, he had known

• • •

[42] commits a horrible crime, and then, once they get over to the jail, for the first time in their life they start going to a Bible study, and discover that if they just

accept Jesus Christ as their Savior, they are never going to commit a crime again, and therefore, they shouldn't be punished.

This is a young man who has had sincere, religious beliefs his entire life, and everything we know about this young man indicates that this violent act is a complete aberration, everything we know about his history.

As far as we know, all the evidence in the case, the Probation report, this is the only violent act there is any evidence that he has ever committed.

It is, therefore, not hard to believe that he, in fact, does sincerely hold these religious beliefs, and that he – in fact, when he says, a force come over him, that that is his best explanation.

Looking at his background, it's a sincere explanation.

Now, one thing I would like to point out is that the Commonwealth – all this evidence that we put on in the penalty phase of the trial, certainly, and everything seen in the Probation report, certainly [43] constitutes a great body of mitigation evidence concerning whether or not the death penalty should be imposed in this case.

The Commonwealth offered nothing to rebut any of this. There has never been any indication that Lonnie's religious beliefs are not sincere.

As Mr. Hefner says, everything Lonnie told him checked out, which was capable of being checked out.

The witnesses in the penalty phase, and all the people Mr. Hefner talked to, all would agree, that this offense

was completely out of character for Lonnie. They were all shocked.

I guess, at this time, I'd like to sum up, as best I can, from a little bit different point of view than Lonnie, the factors in this case, in addition to what I have already mentioned, that I think justify reducing the recommendation of the death penalty to a life sentence.

We have a young man who was raised in a religious home, that certainly, for the first eighteen, nineteen years of his life, was a very responsible, kind, caring young man, and family member, in spite of some setbacks he suffered; primarily, the loss of his parents.

He lost his father at a young age, to illness,

• • •

VIRGINIA:

IN THE SUPREME COURT

Lonnie Weeks, Jr.,

Appellant,

v. Record No. 940335

Commonwealth of Virginia,

Appellee

ASSIGNMENTS OF ERROR AND DESIGNATION OF RECORD

COMES NOW the Appellant, Lonnie Weeks, Jr., and, pursuant to Rule 5:22 of the Rules of the Supreme Court of Virginia, files this, his *Assignments of Error and Designation of Record*, as follows:

Assignments of Error

Appellant makes the following assignments of error from the trial of this matter, upon which he intends to rely for reversal of the conviction and review of the sentence of death, to include all issues encompassed by each assignment:

1. The sentence of death in this case was imposed under the influence of passion, prejudice, or other arbitrary factor.

2. The sentence of death in this case is excessive or disproportionate to the penalty imposed in similar cases.

3. The trial court erred by refusing to order all the items requested in defendant's *Motion for Bill of Particulars*.

4. The trial court erred by refusing to order all the items requested in defendant's *Motion for Discovery and Inspection*.

5. The trial court erred by denying defendant's *Motion to Enjoin Law Enforcement Officers from Wearing Uniforms in Courtroom While Sitting as Spectators, or Grant Other Appropriate Relief*.

6. The trial court erred by denying defendant's *Motion to Disqualify Commonwealth's Attorney*.

7. The trial court erred by denying the defendant's request for the assistance of an expert investigator.

8. The trial court erred by denying the defendant's request to be heard *ex parte* on his motion for criminal records pursuant to § 19.2-389 of the Code of Virginia.

9. The trial court erred by denying the defendant's motion for criminal records pursuant to § 19.2-389 of the Code of Virginia.

10. The trial court erred by denying defendant's request to be heard *ex parte* on his motion for scientific testing pursuant to § 2.1-434.11 of the Code of Virginia.

11. The trial court erred by denying the defendant's request to be heard *ex parte* on his motion for expert assistance in the fields of pathology and ballistics.

12. The trial court erred by denying the defendant's pretrial request for expert assistance in the fields of pathology and ballistics.

13. The trial court erred by denying the defendant's renewed request for a *Bill of Particulars* pursuant to Virginia Code Section 19.2-399.

14. The trial court erred by denying the defendant's request for individual *voir dire* of jurors.

15. The trial court erred by denying the defendant's *Motion to Declare the Virginia Capital Murder and Death Penalty Statutes Unconstitutional and to Prohibit the Imposition of the Death Penalty on the Grounds that the Virginia Death Penalty Statutes Violate the Virginia and United States Constitutions*, which *Motion* cited and relied upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 8, 9 and 11 of the Constitution of Virginia.

16. The trial court erred by denying the defendant's *Motion to Compel Discovery*.

17. The trial court erred by denying the defendant's *Motion for Continuance* heard on October 14, 1994.

18. The trial court erred by denying the defendant's motion to suppress evidence obtained from him in violation of the Fourth Amendment to the Constitution of the United States.

19. The trial court erred by denying the defendant's motion to suppress evidence obtained from him in violation of the Fifth Amendment to the Constitution of the United States.

20. The trial court erred by denying the defendant's motion *in limine* to prohibit the introduction of evidence concerning unadjudicated acts of the defendant related to an alleged murder in North Carolina.

21. The trial court erred by denying the defendant's proposed *voir dire* questions (numbered 1 through 12) concerning bias of potential jurors against the defendant and in favor of imposing the death penalty.

22. The trial court erred by denying the defendant's proposed *voir dire* questions (numbered 15 through 26) which attempted to determine racial bias of potential jurors.

23. The trial court erred by denying the defendant's proposed *voir dire* question (numbered 44A) concerning potential jurors' belief(s) as to whether a life sentence would be carried out.

24. The trial court erred by denying the defendant's proposed *voir dire* question (numbered 45) concerning potential jurors' belief(s) as to whether a sentence of death would be carried out.

25. The trial court erred by denying the defendant's challenge for cause to juror Pama.

26. The trial court erred in admitting Commonwealth's exhibit 23A.

27. The trial court erred by admitting the hearsay statement of a co-defendant that the defendant shot the victim.

28. The trial court erred by admitting into evidence witness J. K. Roland's testimony that the defendant was not telling the truth and was lying when the defendant denied shooting the victim.

29. The court erred by admitting into evidence witness J. K. Roland's testimony that the defendant knew the victim could not see his hands.

30. The trial court erred by admitting testimony of Christopher Daniels that he had been threatened by "admirers" of the defendant.

31. The trial court erred by denying the defendant's motion for a mistrial based on the Commonwealth's mention of parole eligibility in the presence of the jury.

32. The trial court erred in admitting the testimony of Thomas Trochum concerning the characteristics of a bullet from an unrelated case in North Carolina.

33. The trial court erred in denying the defendant's motion to strike the Commonwealth's evidence on the offense of capital murder made on the grounds that the evidence was insufficient to prove the element of premeditation.

34. The trial court erred in denying the defendant's renewed motion for the appointment of a forensic pathologist and a ballistics expert to assist the defense, and to continue the matter to provide sufficient time for the defendant to effectively consult with and otherwise make use of such experts.

35. The trial court erred in refusing to give defendant's proposed instruction F to the jury or to otherwise fully and properly instruct the jury concerning the meaning of "willful, deliberate, and premeditated" in light of the nature of the offense charged, the evidence adduced at trial, and the law applicable thereto.

36. The trial court erred by denying defendant's renewed objection to admission of victim impact testimony at trial.

37. The trial court erred in permitting the admission at trial of evidence of the criminal records of individuals who allegedly conspired with the defendant to distribute marijuana.

38. The trial court erred in permitting the Commonwealth during cross-examination to question the defendant regarding the purported possession of a gun by the co-defendant, which gun was not connected in any way to the offense charged in this matter.

39. The trial court erred in permitting the Commonwealth to question the defendant regarding how many times he had talked with his attorneys about his testimony.

40. The trial court erred in refusing to give the jury defendant's proposed instruction A1 or to otherwise fully and properly instruct the jury regarding the proper meaning of "aggravated battery" in light of the nature of the offense charged, the evidence adduced at trial and the law applicable thereto.

41. The trial court erred in refusing to give the jury defendant's proposed instruction C1 or to otherwise fully and properly instruct the jury regarding their option to give effect to mitigating evidence by sentencing the defendant to life in prison even if they found one or all of the statutory "aggravating factors" beyond a reasonable doubt, in light of the nature of the offense charged, the evidence adduced at trial and the law applicable thereto.

42. The trial court erred in giving the jury finding forms which did not expressly provide a choice for a sentence of life imprisonment upon a finding of one or more aggravating factors.

43. The trial court erred in refusing, in response to a specific jury question regarding the possibility of parole, to instruct the jury that they were to presume their sentence would be carried out.

44. The trial court erred in refusing, in response to a specific jury request for clarification, to specifically instruct the jury that if they found one or more aggravating factors beyond a reasonable doubt, they could sentence the defendant to life in prison or to death.

45. The court erred in making the Victim Impact Statement a part of the record and considering it prior to sentencing the defendant.

46. The trial court erred in refusing to set aside the sentence of death after the consideration of the pre-sentence report and the good cause shown for setting aside the sentence of death at the sentencing hearing.

47. The trial court erred in denying the defendant's motion to set aside the sentence of death.

Designation of Record

Appellant designates the following as the parts of the record relevant and germane to the review and the assignments of error in this matter. References are to the *Table of Contents* in this matter filed by the Clerk of the trial court with the Clerk of the Supreme Court, except where otherwise noted.

1. Volume I, pages 1 through 255.

2. Volume II, pages 256 through 492.

3. Volume III, pages 493 through 747.

4. Volume IV, pages 748 through 869.

5. Commonwealth's Exhibit 1, filed 10/15/93.

6. Commonwealth's Exhibits 1, 2A, 2B, 3, 4A through 4Y, 5, 6, 7, 8, 9A, 9B, 9C, 10, 11, 12, 13, 14A through 14G, 15, 16, 17, 18, 19, 20, 21, 22, 23, 23A, 24A, 24B, 25, 26A through 26D, 27A, 27B, 28A, 28B, 29A, 29B, 29C, 30, 31A, 31B, 32, 33A, 33B, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, all filed 10/19/93.

7. Commonwealth's Exhibits 47, 48, 49, 50, 51, 52, all filed 10/20/93.

8. Defendant's Exhibit 1, filed 10/15/93.

* * *

VIRGINIA:

IN THE SUPREME COURT

LONNIE WEEKS, JR.

v. Record No: 94-335

COMMONWEALTH OF VIRGINIA

MOTION TO EXCEED PAGE LIMIT FOR BRIEF

COMES NOW LONNIE WEEKS, JR. by Counsel, and, pursuant to Rule 5:26 of the Rules of the Supreme Court, requests that the Court accept his [sic] to file his 102-page brief filed this day, and in support thereof states as follows:

1. This matter is an appeal of a capital murder conviction where a sentence of death was imposed.

2. Appellant has assigned 47 errors from the proceedings in the trial court; these errors have been assigned in good faith and not with any frivolous intent.

3. To require the appellant to limit his brief to fewer pages might cause him either to waive by default legitimate issues which should be addressed by this Court as a matter of due process or to reduce the effectiveness of his argument on the issues.

4. The Eighth and Fourteenth Amendments to the Constitution of the United States require a heightened level of due process and higher reliability in capital proceedings than in other criminal matter, due to the extreme nature of the penalty potentially to be imposed.

WHEREFORE, the appellant respectfully requests that the Court waive the page-limit for briefs and accept his brief as filed.

LONNIE WEEKS, JR.
By Counsel

/s/ Daniel J. Morissette
DANIEL J. MORISSETTE, ESQUIRE
Virginia State Bar No. 24084
DePolo & Morissette
9843 Business Way
Manassas, Virginia 22110
(703) 369-1987
Counsel for Defendant

/s/ William J. Baker
WILLIAM J. BAKER, ESQUIRE
Virginia State Bar No. 01159
9246 Center Street
2nd Floor
Manassas, Virginia 22110
(703) 369-6900
Counsel for Defendant

Certificate

I hereby certify that I have this 11th day of May, 1994, mailed by certified mail, postage prepaid, a copy of this motion to the Clerk of the Supreme Court of Virginia and the Office of the Attorney General of Virginia.

/s/ Daniel J. Morissette
Daniel J. Morissette, Esquire

SUPREME COURT OF VIRGINIA

[Caption Omitted In Printing]

• • •

This court has held that "A killing inflicted by multiple gunshot wounds may constitute an aggravated battery" within the meaning of Va. Code Section 19.2-264.2 Where there is an appreciable lapse of time between the first shot and the last and death does not result instantaneously from the first" See *Barnes v. Commonwealth*, 234 Va. 130, 360 SE 2d 196 (1987) cert denied 484 U.S. 1036, 108 S Ct 763, 98 L Ed 2d 779 (1988).

Defendant's proposed instruction A-1 was the exact wording used by this court in *Barnes* to define how a murder inflected by means of multiple gunshot wounds could constitute an aggravated battery within the meaning of Va. Code Section 19.2-264.2 Defendant was entitled to a jury instruction which explained the law on an issue which was raised by the facts of his case. Failure by the trial court to give defendant's proposed jury instruction A-1 constituted prejudicial error with respect to the sentencing portion of his trial and constituted a violation of his rights under Article 1 Sections 8 and 11 of the Constitution of Virginia and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

41st Assigned Error

In a capital murder case, consideration of the character and record of the individual offender is indispensable in meeting the requirements of the Eighth Amendment. *Woodson v. North Carolina, supra.* In *Penry v. Lynaugh* the

Supreme Court stated that " . . . it is precisely because the punishment should be directly related to the personal culpability of the defendat [sic] that the jury must be allowed to consider *and give effect to* mitigation evidence relevant to a defendant's character or record or the circumstances of the offense." 492 U.S. 302, 327-328, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989) (emphasis added). The Court further stated, " . . . in the absence of instructions informing the jury that it could consider *and give effect to mitigating evidence . . . by declining to impose the death penalty,* we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to the evidence in rendering its sentencing decision. *Id.*, (emphasis added), quoting *California v. Brown*, 479 U.S. 538, 545, 93 L.Ed.2d 934, 101 S.Ct. 837 (1987) (O'Connor, J., concurring).

Instruction C1 was a correct statement of the law under *Penry*, was not needlessly redundat, [sic] and was materially vital to the defendant; it should therefore have been given to the jury by the court. *see Jimenez* and *Wade, supra.*

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

42nd Assigned Error

The statutory finding forms in Virginia do not expressly provide for a finding of one or both of the aggravating factors beyond a reasonable doubt and a

sentence of life imprisonment; they are therefore violative of the principle enunciated in in [sic] *Penry, supra.*

The court's error in failing to provide the jury with finding forms complying with *Penry* violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

43rd Assigned Error

It was obvious from the question presented by the jury that the jurors were considering extraneous matters which had not been raised either by the evidence or by the instructions given them. The only reference to parole heard by the jury occurred when the Commonwealth asked witness Daniels when he was eligible for parole, *Appendix*, 2267, after Daniels testified he had been sentenced to forty years, *Appendix*, 2257. Although the court instructed the jurors to disregard the question, *Appendix*, 2269, obviously the jurors did not do so. The jury wished to know how long the defendant would spend in prison if they awarded a sentence of life imprisonment and at least one or more of the jurors was considering an extraneous factor other than the law and evidence of the case. Various studies have shown that juror's beliefs concerning parole are often erroneous. *See The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605 (1989). The instruction given is inadequate to remind the jurors of their duties; indeed, the admonition "You are not to concern yourself with what happens afterwards" raises by implication that

something will happen afterwards to reduce a life sentence or reduce a death sentence. At a minimum, the jury should have been instructed that they should consider the two alternatives they had before them as being the punishment the defendant would receive. Defendant's proposed instruction that the jury should presume that their sentence would be carried out would have required the jury to consider the alternatives seriously without the extraneous factor of parole, which by the nature of the jury question had entered into their deliberations. A defendant should not be sentenced to death on the basis of information which he has no opportunity to deny or explain. *Skipper v. South Carolina*, 476 U.S. 1, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986); *Gardner v. Florida*, 430 U.S. 349, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977). The instruction proposed by the defendant in response to the jury's question is even less definitive than a similar instruction held to be constitutionally inadequate in a like situation. *See Simmons v. South Carolina*, 62 USLW 4509 (1994).

Denial of defendant's proposed instruction violated his rights under Article I, Sections 8 and 11 of the constitution of Virginia and the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

44th Assigned Error

The defendant relies on the argument set forth under the *41st Assigned Error, supra,* in response to the question presented on this error.

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

45th Assigned Error

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

46th Assigned Error

The trial court's failure to set aside the sentence of death and impose a life sentence, in light of the evidence and argument at trial and at thhe [sic] sentencing hearing, where good cause was

* * *

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 27th *day of* May, 1994.

Lonnie Weeks, Jr., Appellant,

against Record No. 940335
Circuit Court No. CR33170

Commonwealth of Virginia, Appellee.

Upon an appeal of right from a judgment rendered by the Circuit Court of Prince William County on the 14th day of January, 1994.

On May 12, 1994 came the appellant, by counsel, and filed a motion to file an opening brief in this case in excess of the page limit.

On consideration whereof, the motion is denied. The appellant shall have 30 days from the date of this order to file an opening brief consisting of no more than 50 pages.

A Copy,
Teste:

/s/ David B. Beach
Clerk

VIRGINIA SUPREME COURT

[Caption Omitted In Printing]

• • •

ASSIGNMENTS OF ERROR

1. The sentence of death in this case was imposed under the influence of passion, prejudice, or other arbitrary factor.

2. The sentence of death in this case is excessive or disproportionate to the penalty imposed in similar cases.

3. The trial court erred by refusing to order all the items requested in defendant's Motion for Bill of Particulars.

4. The trial court erred by refusing to order all the items requested in defendant's *Motion for Discovery and Inspection*.

5. The trial court erred by denying defendant's *Motion to Enjoin Law Enforcement Officers from Wearing Uniforms in Courtroom While Sitting as Spectators, or Grant Other Appropriate Relief*.

6. The trial court erred by denying defendant's *Motion to Disqualify Commonwealth's Attorney*.

7. The trial court erred by denying the defendant's request for the assistance of an expert investigator.

8. The trial court erred by denying the defendant's request to be heard *ex parte* on his motion for criminal records pursuant to § 19.2-389 of the Code of Virginia.

9. The trial court erred by denying the defendant's motion for criminal records pursuant to § 19.2-389 of the Code of Virginia.

10. The trial court erred by denying defendant's request to be hard *ex parte* on his motion for scientific testing pursuant to § 2.1-434.11 of the Code of Virginia.

11. The trial court erred by denying the defendant's request to be heard *ex parte* on his motion for expert assistance in the fields of pathology and ballistics.

12. The trial court erred by denying the defendant's pretrial request for expert assistance in the fields of pathology and ballistics.

13. The trial court erred by denying the defendant's renewed request for a *Bill of Particulars* pursuant to Virginia Code Section 19.2-399.

14. The trial court erred by denying the defendant's request for individual *voir dire* of jurors.

15. The trial court erred by denying the defendant's *Motion to Declare the Virginia Capital Murder and Death Penalty Statutes Unconstitutional and to Prohibit the Imposition of the Death Penalty on the Grounds that the Virginia Death Penalty Statutes Violate the Virginia and United States Constitutions*, which *Motion* cited and relied upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 8, 9 and 11 of the Constitution of Virginia.

16. The trial court erred by denying the defendant's *Motion to Compel Discovery*.

17. The trial court erred by denying the defendant's *Motion for Continuance* heard on October 14, 1994.

18. The trial court erred by denying the defendant's motion to suppress evidence obtained from him in violation of the Fourth Amendment to the Constitution of the United States.

19. The trial court erred by denying the defendant's motion to suppress evidence obtained from him in violation of the Fifth Amendment to the Constitution of the United States.

20. The trial court erred by denying the defendant's motion *in limine* to prohibit the introduction of evidence concerning unadjudicated acts of the defendant related to an alleged murder in North Carolina.

21. The trial court erred by denying the defendant's proposed *voir dire* questions (numbered 1 through 12) concerning bias of potential jurors against the defendant and in favor of imposing the death penalty.

22. The trial court erred by denying the defendant's proposed *voir dire* questions (numbered 15 through 26) which attempted to determine racial bias of potential jurors.

23. The trial court erred by denying the defendant's proposed *voir dire* question (numbered 44A) concerning potential jurors' belief(s) as to whether a life sentence would be carried out.

24. The trial court erred by denying the defendant's proposed *voir dire* question (numbered 45) concerning potential jurors' belief(s) as to whether a sentence of death would be carried out.

25. The trial court erred by denying the defendant's challenge for cause to juror Pama.

26. The trial court erred in admitting Commonwealth's exhibit 23A.

27. The trial court erred by admitting the hearsay statement of a co-defendant that the defendant shot the victim.

28. The trial court erred by admitting into evidence witness J. K. Roland's testimony that the defendant was not telling the truth and was lying when the defendant denied shooting the victim.

29. The court erred by admitting into evidence witness J. K. Roland's testimony that the defendant knew the victim could not see his hands.

30. The trial court erred by admitting testimony of Christopher Daniels that he had been threatened by "admirers" of the defendant.

31. The trial court erred by denying the defendant's motion for a mistrial based on the Commonwealth's mention of parole eligibility in the presence of the jury.

32. The trial court erred in admitting the testimony of Thomas Trochum concerning the characteristics of a bullet from an unrelated case in North Carolina.

33. The trial court erred in denying the defendant's motion to strike the Commonwealth's evidence on the offense of capital murder made on the grounds that the evidence was insufficient to prove the element of premeditation.

34. The trial court erred in denying the defendant's renewed motion for the appointment of a forensic pathologist and a ballistics expert to assist the defense, and to continue the matter to provide sufficient time for the defendant to effectively consult with and otherwise made use of such experts.

35. The trial court erred in refusing to give defendant's proposed instruction "F" to the jury or to otherwise fully and properly instruct the jury concerning the meaning of "willful, deliberate, and premeditated" in light of the nature of the offense charged, the

evidence adduced at trial, and the law applicable thereto.

36. The trial court erred in denying defendant's renewed objection to admission of victim impact testimony at trial.

37. The trial court erred in permitting the admission at trial of evidence of the criminal records of individuals who allegedly conspired with the defendant to distribute marijuana.

38. The trial court erred in permitting the Commonwealth during cross-examination to question the defendant regarding the purported possession of a gun by the co-defendant, which gun was not connected in any way to the offense charged in this matter.

39. The trial court erred in permitting the Commonwealth to question the defendant regarding how many times he had talked with his attorneys about his testimony.

40. The trial court erred in refusing to give the jury defendant's proposed instruction "A1" or to otherwise fully and properly instruct the jury regarding the proper meaning of "aggravated battery" in light of the nature of the offense charged, the evidence adduced at trial and the law applicable thereto.

41. The trial court erred in refusing to give the jury defendant's proposed instruction "C1" or to otherwise fully and properly instruct the jury regarding their option to give effect to mitigating evidence by sentencing the defendant to life in prison even if they found one or all of the statutory "aggravating factors" beyond a reasonable doubt, in light of the nature of the offense charged, the evidence adduced at trial and the law applicable thereto.

42. The trial court erred in giving the jury finding forms which did not expressly provide a choice for a sentence of life imprisonment upon a finding of one or more aggravating factors.

43. The trial court erred in refusing, in response to a specific jury question regarding the possibility of parole, to instruct the jury that they were to presume their sentence would be carried out.

44. The trial court erred in refusing, in response to a specific jury request for clarification, to specifically instruct the jury that if they found one or more aggravating factors beyond a reasonable doubt, they could sentence the defendant to life in prison or to death.

45. The court erred in making the Victim Impact Statement a part of the record and considering it prior to sentencing the defendant.

46. The trial court erred in refusing to set aside the sentence of death after the consideration of the presentence report and the good cause shown for setting aside the sentence of death at the sentencing hearing.

47. The trial court erred in denying the defendant's motion to set aside the sentence of death.

QUESTIONS PRESENTED

1. WAS THE SENTENCE OF DEATH IN THIS CASE IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE, OR OTHER ARBITRARY FACTOR?

2. IS THE SENTENCE OF DEATH IN THIS CASE EXCESSIVE OR DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES?

3. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY REFUSING TO ORDER ALL THE ITEMS REQUESTED IN DEFENDANT'S *MOTION FOR BILL OF PARTICULARS*?

4. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY REFUSING TO ORDER ALL THE ITEMS REQUESTED IN THE DEFENDANT'S *MOTION FOR DISCOVERY AND INSPECTION*?

5. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S *MOTION TO ENJOIN LAW ENFORCEMENT OFFICERS FROM WEARING UNIFORMS IN COURTROOM WHILE SITTING AS SPECTATORS, OR GRANT OTHER APPROPRIATE RELIEF*?

6. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S *MOTION TO DISQUALIFY COMMONWEALTH'S ATTORNEY*?

7. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S REQUEST FOR THE ASSISTANCE OF AN EXPERT INVESTIGATOR.

8. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING TO HEAR *EX PARTE* HIS *EX PARTE MOTION FOR DISCLOSURE OF RECORDS MAINTAINED BY THE CENTRAL CRIMINAL RECORDS EXCHANGE*?

9. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANTS RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN DENYING THE DEFENDANT'S *EX PARTE MOTION FOR DISCLOSURE OF RECORDS MAINTAINED BY THE CENTRAL CRIMINAL RECORDS EXCHANGE*?

10. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING DEFENDANTS REQUEST TO BE HEARD *EX PARTE* ON HIS MOTION FOR SCIENTIFIC TESTING PURSUANT TO § 2.1-434.11 OF THE CODE OF VIRGINIA?

11 DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANTS REQUEST TO BE HEARD *EX PARTE* ON HIS MOTION FOR EXPERT ASSISTANCE IN THE FIELDS OF PATHOLOGY AND BALLISTICS?

12. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S PRETRIAL REQUEST FOR

EXPERT ASSISTANCE IN THE FIELDS OF PATHOLOGY AND BALLISTICS?

13. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING DEFENDANT'S RENEWED REQUEST FOR A BILL OF PARTICULARS PURSUANT TO VIRGINIA CODE § 19.2-399?

14. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S REQUEST FOR INDIVIDUAL *VOIR DIRE* OF JURORS?

15. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING DEFENDANT'S *MOTION TO DECLARE THE VIRGINIA CAPITAL MURDER AND DEATH PENALTY STATUTES UNCONSTITUTIONAL AND TO PROHIBIT THE IMPOSITION OF THE DEATH PENALTY ON THE GROUNDS THAT THE VIRGINIA DEATH PENALTY STATUTES VIOLATE THE VIRGINIA AND UNITED STATES CONSTITUTIONS?*

16. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S *MOTION TO COMPEL DISCOVERY*?

17. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S *MOTION FOR CONTINUANCE* MADE ON OCTOBER 14, 1993?

18. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM HIM IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

19. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM HIM IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

20. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S MOTION *IN LIMINE* TO PROHIBIT THE INTRODUCTION OF EVIDENCE CONCERNING UNADJUDICATED ACTS OF THE DEFENDANT RELATED TO AN ALLEGED MURDER IN NORTH CAROLINA?

21. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE

DEFENDANT'S PROPOSED *VOIR DIRE* QUESTIONS (NUMBERED 1 THROUGH 12) CONCERNING BIAS OF POTENTIAL JURORS AGAINST THE DEFENDANT AND IN FAVOR OF OPPOSING THE DEATH PENALTY?

22. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S PROPOSED *VOIR DIRE* QUESTIONS (NUMBERED 15 THROUGH 26) WHICH ATTEMPTED TO DETERMINE THE RACIAL BIAS OF JURORS?

23. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S PROPOSED *VOIR DIRE* QUESTION (NUMBERED 44A) CONCERNING POTENTIAL JURORS' BELIEFS AS TO WHETHER A LIFE SENTENCE WOULD BE CARRIED OUT?

24. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S PROPOSED *VOIR DIRE* QUESTION (NUMBERED 45) CONCERNING POTENTIAL JURORS' BELIEF(S) AS TO WHETHER A SENTENCE OF DEATH WOULD BE CARRIED OUT?

25. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S CHALLENGE FOR CAUSE TO JUROR PAMA?

26. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY ADMITTING COMMONWEALTH'S EXHIBIT 23A INTO EVIDENCE?

27. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA WHEN IT ADMITTED INTO EVIDENCE THE HEARSAY STATEMENT OF THE CODEFENDANT THAT THE DEFENDANT SHOT THE VICTIM?

28. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA WHEN IT ADMITTED INTO EVIDENCE WITNESS ROLAND'S TESTIMONY THAT THE DEFENDANTS [sic] WAS LYING WHEN HE DENIED SHOOTING THE TROOPER?

29. DID THE TRIAL COURT ERR AND VIOLATE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY ADMITTING INTO EVIDENCE WITNESS J. K. RONALD'S TESTIMONY THAT THE DEFENDANT KNEW THE VICTIM COULD NOT SEE HIS HANDS?

30. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY ADMITTING THE TESTIMONY OF CHRISTOPHER DANIELS THAT HE HAD BEEN THREATENED BY "ADMIRERS" OF THE DEFENDANT?

31. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL BASED ON THE COMMONWEALTH'S MENTION OF PAROLE ELIGIBILITY IN THE PRESENCE OF THE JURY?

32. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA BY ADMITTING THE TESTIMONY OF THOMAS TROCHUM CONCERNING THE CHARACTERISTICS OF A BULLET FROM AN UNRELATED CASE IN NORTH CAROLINA?

33. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN DENYING THE DEFENDANT'S MOTION TO STRIKE THE COMMONWEALTH'S EVIDENCE ON THE OFFENSE OF CAPITAL MURDER ON THE GROUNDS THAT THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENT OF PREMEDITATION?

34. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN DENYING THE DEFENDANT'S RENEWED MOTION FOR THE APPOINTMENT OF A FORENSIC PATHOLOGIST AND A BALLISTICS EXPERT TO ASSIST THE DEFENSE, AND TO CONTINUE THE MATTER TO PROVIDE SUFFICIENT TIME FOR THE DEFENDANT TO EFFECTIVELY CONSULT WITH AND OTHERWISE MAKE USE OF SUCH EXPERTS?

35. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING TO GIVE DEFENDANT'S PROPOSED INSTRUCTION "F" TO THE JURY OR TO OTHERWISE FULLY AND PROPERLY INSTRUCT THE JURY CONCERNING THE MEANING OF "WILLFUL, DELIBERATE, AND PREMEDITATED" IN LIGHT OF THE NATURE OF THE OFFENSE CHARGED, THE EVIDENCE ADDUCED AT TRIAL, AND THE LAW APPLICABLE THERETO?

36. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN DENYING THE DEFENDANT'S RENEWED MOTION OBJECTING TO THE INTRODUCTION OF VICTIM IMPACT EVIDENCE AT THE SENTENCING PHASE OF THE TRIAL?

37. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN PERMITTING THE ADMISSION AT TRIAL OF EVIDENCE OF THE CRIMINAL RECORDS OF INDIVIDUALS WHO ALLEGEDLY CONSPIRED WITH THE DEFENDANT TO DISTRIBUTE MARIJUANA?

38. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN PERMITTING THE COMMONWEALTH DURING CROSS-EXAMINATION OF THE DEFENDANT TO QUESTION HIM REGARDING THE PURPORTED POSSESSION OF A GUN BY THE CODEFENDANT, WHICH GUN

WAS NOT CONNECTED IN ANY WAY TO THE OFFENSE CHARGED IN THIS MATTER?

39. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN PERMITTING THE COMMONWEALTH TO QUESTION THE DEFENDANT REGARDING HOW MANY TIMES HE HAD TALKED WITH HIS ATTORNEYS ABOUT HIS TESTIMONY?

40. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING TO GIVE THE JURY DEFENDANT'S PROPOSED INSTRUCTION "A1" OR TO OTHERWISE FULLY AND PROPERLY INSTRUCT THE JURY REGARDING THE PROPER MEANING OF "AGGRAVATED BATTERY" IN LIGHT OF THE NATURE OF THE OFFENSE CHARGED, THE EVIDENCE ADDUCED AT TRIAL AND THE LAW APPLICABLE THERETO?

41. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING TO GIVE THE JURY DEFENDANT'S PROPOSED INSTRUCTION "C1" OR TO OTHERWISE FULLY AND PROPERLY INSTRUCT THE JURY REGARDING THEIR OPTION TO GIVE EFFECT TO MITIGATING EVIDENCE BY SENTENCING THE DEFENDANT TO LIFE IN PRISON EVEN IF THEY FOUND ON[E] OR ALL OF THE STATUTORY "AGGRAVATING FACTORS" BEYOND A REASONABLE DOUBT, IN LIGHT OF THE NATURE OF THE OFFENSE CHARGED, THE EVIDENCE

ADDUCED AT TRIAL AND THE LAW APPLICABLE THERETO?

42. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN GIVING THE JURY FINDING FORMS WHICH DID NOT EXPRESSLY PROVIDE A CHOICE FOR A SENTENCE OF LIFE IMPRISONMENT UPON A FINDING OF ONE OR MORE AGGRAVATING FACTORS?

43. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING, IN RESPONSE TO A SPECIFIC JURY QUESTION REGARDING THE POSSIBILITY OF PAROLE, TO INSTRUCT THE JURY THAT THEY WERE TO PRESUME THEIR VERDICT WOULD BE CARRIED OUT?

44. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING, IN RESPONSE TO A SPECIFIC JURY REQUEST FOR CLARIFICATION, TO SPECIFICALLY INSTRUCT THE JURY THAT IF THEY FOUND ONE OR MORE OF THE AGGRAVATING FACTORS BEYOND A REASONABLE DOUBT, THEY COULD SENTENCE THE DEFENDANT TO LIFE IN PRISON OR TO DEATH?

45. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN MAKING THE VICTIM IMPACT STATEMENT A PART OF THE

RECORD AND CONSIDERING IT PRIOR TO SENTENCING THE DEFENDANT?

46. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN REFUSING TO SET ASIDE THE SENTENCE OF DEATH AFTER CONSIDERATION OF THE PRE-SENTENCE REPORT AND THE GOOD CAUSE SHOWN FOR SETTING ASIDE THE SENTENCE OF DEATH AT THE SENTENCING HEARING?

47. DID THE TRIAL COURT ERR AND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF VIRGINIA IN DENYING DEFENDANT'S MOTION TO SET ASIDE THE SENTENCE OF DEATH?

NATURE OF THE CASE

This is a capital murder case which arises from the shooting death of a Virginia state trooper on February 2,4 1993, on the Potomac Mills exit ramp off I-95 in Prince William County. The defendant

* * *

VIRGINIA SUPREME COURT

[Caption Omitted In Printing]

* * *

899, 2570-2571.

Regarding assigned error 41, the defendant also proposed jury instruction "C1", worded as follows: "Even if you find that the Commonwealth has proved one or both of the aggravating factors beycnd a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison." *Appendix*, 901. The court denied the instruction. *Appendix*, 2578.

Regarding assigned error 43, during their deliberations on sentencing the jurors asked the following question to the court: "Does the sentence of life imprisonment in the State of Virginia have the possibility of parole, and if so under what conditions must be met to receive parole?" The Court instructed the jury, "You should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." The defendant objected to the instruction given by the court and requested that the jury be instructed that they should presume their sentence should be carried out. *Appendix*, 2713-2714.

Regarding assigned error 44, during their deliberations in the penalty phase of the trial, the jury sent out a written question asking the court to "clarify" whether or not they had a "duty" to impose the death penalty if they found one of the aggravating factors beyond a reasonable doubt, or whether they could choose between the death

penalty and a life sentence. *Appendix*, 896, 2717-2718. The court refused the defendant's request that the jury be instructed that they could impose a life sentence even if they found one or both of the aggravating factors beyond a reasonable doubt. *Appendix*, 2718-2719, instead instructing them to reread the second paragraph of the finding instruction. *Id.*

Regarding assigned error 45, over the defendant's objection, a Victim Impact Statement, consisting of a letter written by Mrs. Cavazos, was made a part of the record and considered by the court prior to sentencing the defendant. *Appendix*, 945W, 2734-2736.

Regarding assigned error 46, after considering the pre-sentence report and matters raised in the sentencing hearing on January 13, 1994, the trial court sentenced the defendant to death. *Appendix*, 2731-

* * *

VIRGINIA SUPREME COURT

[Caption Omitted In Printing]

* * *

41st Assigned Error

In a capital murder case, consideration of the character and record of the individual offender is indispensable in meeting the requirements of the Eighth Amendment. *Woodson v. North Carolina, supra.* In *Penry v. Lynaugh* the Supreme Court stated that " . . . it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider *and give effect to* mitigation evidence relevant to a defendant's character or record or the circumstances of the offense." 492 U.S. 302, 327-328, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989) (emphasis added). The Court further stated, " . . . in the absence of instructions informing the jury that it could consider *and give effect to mitigating evidence . . . by declining to impose the death penalty*, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to the evidence in rendering its sentencing decision. *Id.*, (emphasis added), quoting *California v. Brown*, 479 U.S. 538, 545, 93 L.Ed.2d 934, 101 S.Ct. 837 (1987) (O'Connor, J., concurring).

Instruction C1 was a correct statement of the law under *Penry*, was not needlessly redundant, and was materially vital to the defendant; it should therefore have been given to the jury by the court. *See Jimenez* and *Wade, supra.*

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

42nd Assigned Error

The statutory finding forms in Virginia do not expressly provide for a finding of one or both of the aggravating factors beyond a reasonable doubt and a sentence of life imprisonment; they are therefore violative of the principle enunciated in in [sic] *Penry, supra.*

The court's error in failing to provide the jury with finding forms complying with *Penry* violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

43rd Assigned Error

It was obvious from the question presented by the jury that the jurors were considering extraneous matters which had not been raised either by the evidence or by the instructions given them. The only reference to parole heard by the jury occurred when the Commonwealth asked witness Daniels when he was eligible for parole, *Appendix*, 2267, after Daniels testified he had been sentenced to forty years, *Appendix*, 2257. Although the court instructed the jurors to disregard the question, *Appendix*, 2269, obviously the jurors did not do so. The jury wished to know how long the defendant would spend in prison if

they awarded a sentence of life imprisonment and at least one or more of the jurors was considering an extraneous factor other than the law and evidence of the case. Various studies have shown that juror's beliefs concerning parole are often erroneous. *See The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing,* 75 Va. L. Rev. 1605 (1989). The instruction given is inadequate to remind the jurors of their duties; indeed, the admonition "You are not to concern yourself with what happens afterwards" raises by implication that something will happen afterwards to reduce a life sentence or reduce a death sentence. At a minimum, the jury should have been instructed that they should consider the two alternatives they had before them as being the punishment the defendant would receive. Defendant's proposed instruction that the jury should presume that their sentence would be carried out would have required the jury to consider the alternatives seriously without the extraneous factor of parole, which by the nature of the jury question had entered into their deliberations. A defendant should not be sentenced to death on the basis of information which he has no opportunity to deny or explain. *Skipper v. South Carolina,* 476 U.S. 1, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986); *Gardner v. Florida,* 430 U.S. 349, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977). The instruction proposed by the defendant in response to the jury's question is even less definitive than a similar instruction held to be constitutionally inadequate in a like situation. *See Simmons v. South Carolina,* 62 USLW 4509 (1994).

Denial of defendant's proposed instruction violated his rights under Article I, Sections 8 and 11 of the Constitution of Virginia and the Fifth, Sixth, Eighth and

Fourteenth Amendments to the Constitution of the United States.

44th Assigned Error

The defendant relies on the argument set forth under the *41st Assigned Error, supra,* in response to the question presented on this error.

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

45th Assigned Error

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

46th Assigned Error

The trial court's failure to set aside the sentence of death and impose a life sentence, where good cause was shown for setting aside the death sentence, violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia.

47th Assigned Error

The jury found that the defendant's conduct was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim and fixed his punishment at death. *Appendix,* 898. The only evidence to support the finding of the jury was that of the aggravated battery to the victim resulting in death. The victim died as a result of multiple gunshot wounds which may indeed constitute an aggravated battery within the meaning of Va. Code Section 19.2-

• • •

Lonnie WEEKS, Jr.,

v.

COMMONWEALTH of Virginia.

Record No. 940335.

Supreme Court of Virginia.

Nov. 4, 1994.

William J. Baker, Daniel J. Morissette, Manassas (DePolo & Morissette, on brief), for appellant.

Robert H. Anderson, III, Asst. Atty. Gen. (James S. Gilmore, III, Atty. Gen., on brief), for appellee.

Present: All the Justices.

COMPTON, Justice.

On February 24, 1993, Virginia State Trooper Jose M. Cavazos was shot and killed by defendant Lonnie Weeks, Jr., in Prince William County. Subsequently, defendant was indicted for the felonious, willful, deliberate, and premeditated homicide of the law enforcement officer, when such killing was for the purpose of interfering with the performance of the trooper's official duties. Code § 18.2-31(6). Defendant also was charged with grand larceny of a motor vehicle, Code § 18.2-95, and use of a firearm in the commission of murder, Code § 18.2-53.1.

Following several pretrial hearings, including a hearing on defendant's motion to suppress his confession, defendant was tried by a single jury during five days in October 1993. As the trial began, defendant pled guilty to

the grand larceny and firearm charges. The court subsequently sentenced defendant to imprisonment for ten-year and three-year terms respectively on those charges.

The jury found the defendant guilty of the capital murder charge and, during the second phase of the bifurcated capital proceeding, the jury fixed the defendant's punishment at death for the capital offense based upon the vileness predicate of the capital murder sentencing statute. Code § 19.2-264.4.

Later, the trial court considered a probation officer's report and heard testimony from the officer relevant to punishment. The court then sentenced the defendant to death for the capital murder.

The death sentence is before us for automatic review under Code § 17-110.1(A), *see* Rule 5:22. As required by statute, we will consider not only the trial errors enumerated by the defendant but also whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. Code § 17-110.1(C).

There is no conflict about any relevant fact in the case. In early February 1993, defendant, who was age 20, a North Carolina resident, and on probation for a 1992 drug conviction, participated in the burglary of a residence in the Fayetteville, North Carolina area. During the course of that crime, defendant obtained a set of keys to a 1987 Volkswagen Jetta automobile parked at the residence, and stole the vehicle. Later that month, defendant drove the vehicle to Washington, D.C., intending to sell it or trade it for drugs. Defendant carried in the vehicle a

Glock Model 17, nine millimeter, semi-automatic pistol loaded with hollow-point bullets. According to the testimony, the bullets were designed for police use, not target practice or hunting; this type of bullet is referred to as a "man-stopper."

During the late evening of February 23, defendant was riding as a passenger in the vehicle being driven by his uncle, 21-year-old Lewis J. Dukes, Jr., a resident of the District of Columbia. The pair was travelling en route from Washington to Richmond southbound on Interstate Route 95.

Around midnight, Trooper Cavazos was operating radar from his marked police vehicle parked in the highway medium monitoring southbound traffic. The Volkswagen driven by Dukes passed the trooper's position at a high rate of speed. The officer activated his vehicle's emergency lights and proceeded to chase the vehicle occupied by defendant. After travelling a brief distance, and passing other vehicles by driving on the right shoulder of the highway, Dukes brought the car to a stop on the Dale City exit ramp, in a dark, remote area.

The trooper pulled his patrol car to a stop behind the Volkswagen, which he approached on foot on the driver's side. Upon the officer's request, Dukes alighted and was standing toward the left rear of the Volkswagen when the trooper asked defendant to step out of the vehicle.

Defendant complied with the officer's request and alighted on the right side of the vehicle as the trooper was near the left side. As defendant left the vehicle he was carrying the fully loaded pistol. He then fired at least six bullets at the officer, two of which entered his body

beside the right and left shoulder straps of the protective vest the trooper was wearing. The officer was immediately rendered unconscious and fell to the pavement, dying within minutes at the scene with his police weapon in its "snapped" holster.

Defendant, with Dukes as a passenger, then drove the Volkswagen from the scene and parked it on the lot of a nearby service station. Defendant returned to the scene of the crime on foot and retrieved Dukes' District of Columbia driver's license that had been dropped on the pavement. Defendant rejoined Dukes, and they were found by police shortly thereafter in the parking lot of a nearby motel.

On appeal, defendant assigns 47 alleged errors committed by the trial court. The defendant has not briefed or argued ten of those assigned errors (Nos. 4, 5, 6, 7, 8, 17, 26, 31, 38, and 39); hence we will not consider them. *Jenkins v. Commonwealth*, 244 Va. 445, 451, 423 S.E.2d 360, 364 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993). In addition, defendant effectively presents no argument in support of five of those alleged errors (Nos. 16, 34, 44, 45, and 46). Typical of the argument in support of those five is the following conclusional statement on brief in support of No. 45: "This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia." We have considered these so-called arguments and find no merit in any of the five.

The remaining assignments of error emphasized by defendant present questions dealing with defendant's

detention before his arrest, his confession, requests for a scientific investigation and expert assistance in the fields of ballistics and pathology, the seating of one juror who was challenged for cause, and use during the trial's penalty phase of victim impact evidence.

First, defendant contends that he was detained for approximately two hours before he was arrested and that this constituted an illegal arrest without probable cause. Because the arrest was illegal, defendant argues, the trial court erred by admitting in evidence defendant's statements to police that were the product of the illegal arrest.

The facts relevant to this issue were presented both at a pretrial suppression hearing and during the trial. The evidence showed that Prince William County police officer James C. Virgil, Jr., was dispatched to the scene of the crime about 12:53 a.m. on February 24, and began searching the immediate area for possible suspects. Shortly, Virgil saw defendant and Dukes walking in the rear parking lot of the motel located about one-half mile from the scene. The men, who were walking close together toward Virgil's marked police car, "turned back around and started to walk away" from the car. Then the pair "started to split apart. One subject was going to the left and one going to the right." When the officer was 15-20 feet from them with the vehicle's headlights and spotlight operating, he stopped the vehicle and began to step from the car. At that point, the men "immediately" threw "both their hands up in the air" and one said "Don't shoot." Virgil then said, "Police. Don't move. Can I talk to you all?"

Virgil approached the men and said, "Is it okay if I pat you down for my safety?" Defendant said "go ahead." Virgil felt the outside of their clothing and seized nothing from either man. At the time Virgil noticed that defendant "was breathing heavily and was sweating profusely." Defendant was wearing a plaid shirt, blue jeans, and no jacket in 29-degree weather. The officer began asking "just basic casual talking questions." The men produced identification with defendant showing a North Carolina driver's license.

When the officer asked, "What are you all doing here?" defendant said they had been "dropped off" at the motel parking lot by a relative several hours earlier to await "two girls from Washington, D.C." While there, defendant said, "We heard the shots." Virgil asked, "What shots?" Without directly responding to that question, defendant stated that he ran "to where the shots came from" and saw a State Trooper on the ground who had been shot. Defendant said that he "ran over to the trooper and he rolled the trooper over to help him." Defendant stated that as other police officers arrived at the scene, he returned to the motel parking lot.

Virgil then asked defendant if the pair "would mind" remaining at the motel to await an investigator to interview them, inasmuch as they were the only persons who had heard the shots and defendant had been to the scene. Defendant agreed, stating "that's fine."

In a few minutes, Prince William County police officer Lyle Denny arrived to assist Virgil. Denny made "a pat down" of defendant and removed from defendant's left trouser pocket "a group of Volkswagen keys." After

examining the keys, Denny returned the keys to the pocket.

Because of the cold weather and the fact that defendant was not wearing a jacket or sweater, Virgil asked the pair whether they would like to sit in his police car. Defendant replied, "I thought you'd never ask. Sure." The two men entered the back seat of the vehicle. Even though the pair could not open the rear doors from the inside, they did not ask to get out. They were not restrained with handcuffs or similar devices. A plastic barrier separating the front and rear parts of the vehicle was in the "down" position, enabling them to speak easily with Virgil when he was in the front seat.

A short while later, upon defendant's request, he was taken to the motel and permitted to make two telephone calls. After making the calls, defendant asked "if he could go get some food and something to drink up at" the service station. About the same time, Virgil learned from the police radio that county officers had located "a suspicious vehicle" at the service station, about 75 yards from the motel lot. Virgil responded to Weeks' request with, "Do you mind holding off right now? . . . I can't let you do that right now, if that's okay with you." Defendant said, "Fine."

A few seconds later, Virgil learned from another radio transmission that the "suspicious" vehicle was a Volkswagen bearing North Carolina license plates. Recalling that defendant had Volkswagen keys in his pocket and carried a North Carolina operator's license, Denny asked defendant, who was inside the police vehicle, "where the keys that were in his pocket were." Defendant

responded, "What keys?" The officer asked defendant to step out of the vehicle and "patted" defendant's pants pockets, finding no keys. Then the rear seat of the vehicle was lifted, and the keys were found directly under where defendant had been sitting. When the officer showed the keys to defendant, he said, "Those aren't my keys."

About 2:45 a.m., after defendant had been with Officer Virgil for about two hours, state police officers arrived to question defendant and Dukes. Near 3:00 a.m., state police Special Agent J.K. Rowland met defendant in the motel lobby. Rowland "explained to him that he was not under arrest" and asked defendant "if he would like to talk . . . about what he had seen up on Interstate 95." Defendant, who Rowland testified was "free to leave at that time," conducted an interview with defendant in private in one of the motel rooms.

We do not agree with defendant's contention that his two-hour detention while being questioned by Officers Virgil and Denny violated his Fourth Amendment rights under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its progeny. *Terry* is not implicated here because, as the trial court found from the undisputed facts, defendant consented to the detention and generally agreed to cooperate with the police. Just as a defendant may consent to a search, he may also consent to what would otherwise amount to a seizure of his person. *Limonja v. Commonwealth*, 8 Va.App. 532, 539-41, 383 S.E.2d 476, 480-82 (1989), *cert. denied*, 495 U.S. 905, 110 S.Ct. 1925, 109 L.Ed.2d 288 (1990).

At every step in the questioning during the whole two-hour period, the defendant readily agreed to the

detention. He consented to the initial "pat down," acquiesced to questioning, accepted the invitation to enter the police car, agreed not to go to the service station for food and drink, acquiesced to a second and third "pat down" of his trouser pockets, and agreed to be interviewed alone in the motel room by Rowland. "The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation." *Florida v. Bostick*, 501 U.S. 429, 439, 111 S.Ct. 2382, 2389, 115 L.Ed.2d 389 (1991).

Next, defendant contends that the trial court erred in denying his motion to suppress the confession made to Special Agent Rowland because the authorities failed to scrupulously honor his request to remain silent.

The facts relevant to this issue show that as Rowland questioned defendant in the motel room, Rowland became "more and more suspicious" of defendant. Even though defendant "was free to leave" at that point, Rowland advised defendant of his constitutional rights according to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as a precaution at 7:40 a.m. Defendant then exercised his right to remain silent and wrote, "Do not want to discuss case any further," on the "Advice of Rights" form that he signed. Rowland honored this request, and ceased questioning.

At 7:50 a.m., Rowland was advised by another investigator that Dukes had just stated that defendant shot the trooper. Rowland arrested defendant at 7:52 a.m.

Subsequently, defendant was taken before a magistrate and then to the Adult Detention Center in Manassas.

Later that morning, classification officers in the jail routinely questioned defendant about his physical and mental state; no attempt was made to elicit information about the crime. During the interview, defendant indicated he was considering suicide because he had shot the trooper. Defendant also voluntarily wrote a letter to a jail official admitting the killing and expressing remorse. Defendant does not contest either of these admissions but attacks the constitutional validity of the following interview.

Near 6:00 p.m. on February 24, defendant was brought to the lounge of the local prosecutor's office where Rowland again interviewed him; additional information had been developed by the police during the day between the termination of the first interview and the beginning of this second interview. Rowland asked defendant, "Do you remember the rights I read to you earlier today?" to which defendant responded affirmatively. Rowland proceeded "to summarize the investigation through the course of the day's events to that point in time."

Among other things, Rowland told defendant that an eyewitness to the shooting had made a positive identification of him as the assailant. A witness actually had identified defendant as a person she saw at the scene after the homicide, but she had not witnessed the shooting. At the conclusion of Rowland's summary, he said to defendant, "This is your opportunity to provide your explanation as to what happened at the shooting scene." Defendant responded, "Yes, I was packing." The officer knew that "packing" meant "carrying a firearm."

The defendant then confessed to the trooper's murder. Defendant stated that when the trooper asked him to get out of the Volkswagen, he picked up the pistol and "thought about throwing it away." Instead, he saw the trooper put his hand down toward his service revolver. Defendant said he then "panicked" and shot the victim "several times rapidly." Defendant stated that he drove, with Dukes as a passenger, to the service station, placing the pistol under the front floor mat of the Volkswagen. This interview lasted about one hour during which defendant readily answered questions and did not invoke his right to remain silent or any other constitutional right.

In support of his attack on the validity of the confession, defendant notes that he made no request to speak with the police after he exercised his right to silence at 7:40 a.m. Instead, he points out, he was held in jail and transported to the prosecutor's office about ten hours later. He notes that at the time of the interview he was restrained in handcuffs and leg irons, being questioned by the same officer to whom he previously indicated a desire to remain silent. Defendant also points out that he was not "read his rights" again, merely "asked if he understood the rights read to him previously." Thus, defendant contends, the confession later introduced at trial violated his constitutional rights. We do not agree.

In *Miranda*, the Supreme Court stated that, once the required warnings have been given a person before a custodial interrogation, the interrogation must cease if the individual, "at any time prior to or during questioning," expresses a desire to remain silent. 384 U.S. at 474,

86 S.Ct. at 1627. At this point, the Court said, the individual has shown an intention "to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Id.*

Subsequently, in discussing the scope of the foregoing *Miranda* passage, the Supreme Court said: "Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." *Michigan v. Mosley*, 423 U.S. 96, 102-03, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). The Court held "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' " *Id.* at 104, 96 S.Ct. at 326. *Accord Lamb v. Commonwealth*, 217 Va. 307, 312, 227 S.E.2d 737, 741 (1976).

We will assume Rowland's preliminary comments at the second interview giving defendant the "opportunity" to explain his part in the crime amounted to an "interrogation." The question thus becomes whether defendant's prior election to remain silent was "scrupulously honored." We hold that it was.

Suggesting a case-by-case approach to determine that continued questioning was appropriate after an initial refusal to answer questions, the *Mosley* court mentioned five factors that related to the evidence in that case. First, whether defendant "was carefully advised" before the

initial interrogation "that he was under no obligation to answer any questions and could remain silent if he wished." *Id.* at 104, 96 S.Ct. at 327. Second, whether there was an immediate cessation of the initial interrogation, and no attempt to persuade defendant to reconsider his position. *Id.* Third, whether the police resumed questioning "only after the passage of a significant period of time." *Id.* at 106, 96 S.Ct. at 327. Fourth, whether *Miranda* warnings preceded the second questioning. *Id.* at 104, 96 S.Ct. at 326-27. Fifth, whether the second interrogation was limited to a crime that had not been the subject of the earlier interrogation. *Id.*

Clearly, when those factors are applied to the present case, no violation of defendant's Fifth Amendment rights occurred. Defendant was carefully advised before the initial interview of his right to remain silent, and there was immediate cessation of that interview when defendant exercised his right to silence. Moreover, ten hours, "a significant period of time," had passed between the first and second interviews, during which time defendant had confessed to the classification officers.

Furthermore, even though a fresh set of *Miranda* warnings was not given before the second interview as was the case in *Mosley*, defendant responded affirmatively when asked whether he remembered the "rights" that were read to him "earlier today." He then readily and without hesitation freely discussed the matter with the investigator and did not revoke his valid waiver. Under these circumstances, the initial waiver is presumed to continue and the failure to offer defendant a new set of warnings does not render the second interview unconstitutional. *See North Carolina v. Butler*, 441 U.S. 369, 373,

99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979); *Washington v. Commonwealth*, 228 Va. 535, 548, 323 S.E.2d 577, 586 (1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

Finally, the mere fact that the second interview involved some of the same subject matter discussed during the initial interview does not render the confession constitutionally invalid. *United States v. House*, 939 F.2d 659, 662 (8th Cir.1991). Defendant was advised of the new facts that had been developed by the investigators, and there was no effort to persuade defendant against his will after he initially invoked his right to silence by repeating questions about the same subject matter covered earlier. Hence, there was no violation of *Miranda* under that prong of *Mosley* as a result of the reinterrogation. *See Jackson v. Wyrick*, 730 F.2d 1177, 1180 (8th Cir.), *cert. denied*, 469 U.S. 849, 105 S.Ct. 167, 83 L.Ed.2d 102 (1984).

Next, the defendant complains about the denial of two pretrial motions, which defendant wished to be considered by the court ex parte out of the prosecutor's presence.

First, defendant filed a paper entitled "Ex Parte Motion for Disclosure of Records Maintained by the Central Criminal Records Exchange." In the motion, defendant sought copies of any criminal records pertaining to a number of individuals, including himself and Dukes, and certain North Carolina residents likely to be called as witnesses by the prosecutor. Over defendant's objection, the trial court permitted the prosecutor to attend the hearing on the motion and to argue against granting it. Following the hearing, the court denied the motion.

Code § 19.2-389 is codified among the statutes dealing with the duties and authority of the Exchange (CCRE), a separate division within the Department of State Police and, with a few exceptions, "the sole criminal record-keeping agency of the Commonwealth." Code § 19.2-387(A). Section 19.2-389 provides, in part, that upon "an ex parte motion of a defendant in a felony case and upon the showing that the records requested may be relevant to such case, the court shall enter an order" requiring the CCRE to furnish the defendant copies of any records of persons designated in the order on whom a report has been made to the CCRE. The statute is silent about the nature of any hearing on such motion.

We will assume, but not decide, that the statute is applicable to discovery in felony cases, that the defendant is entitled to be heard ex parte, and that the trial court erred in denying his motion under the statute. Nevertheless, we hold that the court did not commit reversible error because nothing in the record suggests that the trial court's rulings prejudiced defendant's right to fairly defend himself. *See George v. Commonwealth*, 242 Va. 264, 281, 411 S.E.2d 12, 23 (1991), *cert. denied*, 503 U.S. ___, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992).

Many of the persons named in the motion, including Dukes, did not testify at trial. In addition, the trial court had already ordered the prosecutor to furnish defendant before trial criminal history information concerning any witness to be called by the prosecutor "at any hearing in or trial of this case." Therefore, the "ex parte motion" was redundant.

Second, defendant filed a paper labelled "Motion For Scientific Investigation, Ex Parte." Relying upon Code § 2.1-434.11, defendant moved the court to order a scientific investigation into certain factors surrounding the victim's death, including whether death was instantaneous as a result of the fatal wounds.

Code § 2.1-434.11 is codified among the statutes establishing a Division of Forensic Science within the State Department of General Services. That statute authorizes an attorney for an accused to request a scientific investigation, if the attorney believes in good faith that such investigation may be relevant to the criminal charge. The statute provides that the "motion shall be heard ex parte" and, if satisfied as to the correctness of the attorney's representation, the court shall order the investigation to be performed by the Division.

We do not reach the merits of the defendant's complaint because the issue has been procedurally defaulted. The trial court never denied the motion. At the hearing on the motion, with the prosecutor present, the trial court said that it would entertain the motion later upon defendant's showing that he had unsuccessfully sought the results of such testing that probably already had been conducted by the Division. Defense counsel did not object to this ruling; instead, he withdrew the motion as being not "timely." Because defendant acquiesced in the trial court's ruling, he may not challenge it on appeal. Rule 5:25.

Associated with defendant's claim of error relating to the request for a scientific investigation is the complaint that the trial court erred by denying his request to be

heard ex parte on his motion for expert assistance in the fields of pathology and ballistics, and for denial of the request for appointment of such experts. Defendant asked that his motion for funding for expert assistance "be treated under the same procedure as required by Title 18 USC 3006A(e) in Federal Court." There is no merit to this contention.

We already have decided that a defendant charged with capital murder is not entitled to an ex parte hearing on his motion for expert assistance. *Ramdass v. Commonwealth*, 246 Va. 413, 422, 437 S.E.2d 566, 571 (1993), *rev'd on other grounds sub nom. Ramdass v. Virginia*, ___ U.S. ___, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). In addition, we specifically have refused to apply the federal statute to state capital murder prosecutions. *Id.*

Before moving to the last two issues emphasized by defendant, we will comment on other matters raised before trial that are the subject of assignments of error. These issues warrant only a brief discussion because none of them has merit. Defendant raises related arguments regarding the trial court's partial denial of motions for bills of particulars. No challenge was made to the sufficiency of the indictment; thus, a bill of particulars was not required. *Strickler v. Commonwealth*, 241 Va. 482, 490, 404 S.E.2d 227, 232-33, *cert. denied*, 503 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991). Defendant has procedurally defaulted a contention that we repeatedly have rejected, that is, that Virginia's capital murder and death penalty statutes are constitutionally infirm. In support of that contention, defendant impermissibly incorporates by reference a memorandum filed on the subject in the trial court. *Jenkins*, 244 Va. at 461, 423 S.E.2d at 370 (defendant

has obligation to state clearly to appellate court grounds for assertion trial court's ruling erroneous; cross-reference to arguments presented at trial insufficient).

Next, defendant raises several issues dealing with juror voir dire. He contends the trial court erred in denying individual voir dire and in refusing to allow a number of questions that he submitted to be asked of the prospective jurors. A defendant has no right to individual voir dire. *Stewart v. Commonwealth*, 245 Va. 222, 229, 427 S.E.2d 394, 399, *cert. denied*, ___ U.S. ___, 114 S.Ct. 143, 126 L.Ed.2d 105 (1993). Also, the trial court did not abuse its discretion in disallowing the questions because they were either improper, vague, argumentative, or nonspecific. *Buchanan v. Commonwealth*, 238 Va. 389, 402, 384 S.E.2d 757, 765 (1989), *cert. denied*, 493 U.S. 1063, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990). And, contrary to defendant's argument, the trial court did not abuse its discretion, in this case of a white victim and a black accused, in the manner which it questioned the prospective jurors on the subject of potential racial bias. *See Turner v. Murray*, 476 U.S. 28, 37, 106 S.Ct. 1683, 1688-89, 90 L.Ed.2d 27 (1986) (trial judge retains discretion as to form and number of questions on issue of racial bias when capital murder defendant accused of interracial crime).

Also, defendant argues the trial court erred in denying his challenge for cause of juror Frederick Pama. Responding to the question whether he knew personally anyone who was the victim of a violent crime, Pama said, "About three years ago . . . my wife's first cousin, who was very close to us, got killed. He was a police officer, from a drug shootout, and that affects me."

Pama initially had answered many questions by the trial court and counsel which reflected his ability to serve as an impartial juror. After he answered the foregoing question, he responded to questions by the prosecutor and said he could set aside any opinion he had formed about the case and could render a decision based solely on the law, and evidence produced at trial. Finally, when asked again by the prosecutor whether he "could be fair and impartial and set aside anything" he may have heard in the past and whether he could "be fair in this matter, both to the Commonwealth and to the accused," Pama answered, "I think so."

When denying defendant's motion to strike Pama, the trial court stated that "the proposed juror did not say that it would have an impact. He said, the way I understood his answer, he was not certain if it would have an impact, but at this time it would not."

Upon appellate review, we must give deference to the trial court's decision whether to exclude or retain a prospective juror because the trial court "sees and hears the juror;" accordingly, the trial court's decision will be disturbed only upon a showing of manifest error. *Eaton v. Commonwealth*, 240 Va. 236, 246, 397 S.E.2d 385, 391 (1990), *cert. denied*, 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991) (quoting *Wainwright v. Witt*, 469 U.S. 412, 426, 105 S.Ct. 844, 853, 83 L.Ed.2d 841 (1985)). *Accord George*, 242 Va. at 276, 411 S.E.2d at 19 (juror not automatically disqualified on account of fact son had served as pallbearer at victim's funeral).

We find no manifest error in the court's refusal to dismiss Pama for cause. From a review of Pama's entire

voir dire, we conclude that the trial court was justified in finding that Pama could be impartial during the trial. Our duty to defer to the trial judge on this subject is illustrated by Pama's final answer, "I think so," which the trial judge, not this Court, heard. The juror's emphasis on "so" in that answer conveys an entirely different meaning than if the emphasis had been on "think." On appeal, we must presume he emphasized "so."

Finally, defendant contends the trial court erred in admitting "victim impact testimony" during the penalty phase of the trial. The victim's widow, as well as state troopers who worked with the deceased, testified about the profound effect the killing had on his surviving family and those with whom he worked.

On appeal, defendant mounts a two-prong argument: so-called "victim impact evidence" is not relevant in Virginia to the jury's sentencing decision in a capital case, and, even if it is, the evidence should be limited to the effect upon family members only and not to the effect upon nonfamily members closely associated with the victim. We will not address the latter contention because, in the trial court, the defendant did not distinguish between testimony by family members and testimony from other sources. Therefore, the defendant may not challenge on appeal the admissibility of the troopers' testimony. Rule 5:25.

Addressing the former contention, we hold that victim impact testimony is relevant to punishment in a capital murder prosecution in Virginia, and that the trial court did not err in admitting the testimony in this case. In *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115

L.Ed.2d 720 (1991), the Supreme Court authorized the use of such testimony. The Court said: "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id.* at 827, 111 S.Ct. at 2609.

Defendant's reliance on *Dingus v. Commonwealth*, 153 Va. 846, 149 S.E. 414 (1929), is misplaced. There, in a unitary criminal trial, this Court held improper a prosecutor's argument alluding to the impact of the murder on the victim's widow, because it "in no way assists in determining either the guilt or the innocence of the accused." 153 Va. at 850, 149 S.E. at 415. In contrast, under Virginia's modern, bifurcated capital procedure, victim impact evidence is probative, for example, of the depravity of mind component of the vileness predicate, which the jury in this case found as a basis for imposing the death penalty. As the Supreme Court said in *Payne*, "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." 501 U.S. at 825, 111 S.Ct. at 2608.

In conclusion, defendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. We have considered all the arguments in support of those issues and conclude that none has any merit. Only two of those issues warrant further discussion. First, defendant claims the trial court erred in permitting Special Agent Rowland to testify that Dukes had stated to another investigator

"that Lonnie Weeks did, in fact, shoot the trooper." At trial, defendant objected to the statement specifically on the ground that it was inadmissible hearsay and generally on constitutional grounds.

The hearsay rule does not operate to exclude evidence of a statement offered for the mere purpose of explaining the conduct of the person to whom it was made; this is especially true when the evidence is not offered for the purpose of establishing guilt or innocence of the accused "but for the purpose of showing the reason for the police officers' action in arresting him." *Upchurch v. Commonwealth*, 220 Va. 408, 410, 258 S.E.2d 506, 508 (1979). *See Manetta v. Commonwealth*, 231 Va. 123, 127-28, 340 S.E.2d 828, 830 (1986). As the prosecutor argued, and the trial court implicitly found, this statement was offered to explain Rowland's action in arresting defendant at 7:52 a.m. after considering defendant not in custody 12 minutes earlier, and not to prove that defendant had in fact shot the trooper. Thus, the trial court did not err in admitting the statement.

Second, defendant contends the trial court erred in denying his motion to strike the Commonwealth's evidence on the offense of capital murder made on the ground that the evidence was insufficient to prove the element of premeditation. The question whether a defendant is guilty of a premeditated killing of the victim is usually a jury question. The intention to kill need not exist for any specified length of time prior to the actual killing; the design to kill may be formed only a moment before the fatal act is committed provided the accused had time to think and did intend to kill. *Clozza v. Commonwealth*, 228 Va. 124, 134, 321 S.E.2d 273, 279 (1984),

cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985). In deciding the question, the jury may consider, among other things, the brutality of the attack and whether more than one shot was fired. *Id.*

In the present case, the jury's finding on this element was fully supported by the evidence, and the trial court did not err in denying the motion to strike. On probation, riding in a stolen vehicle, and possessing a weapon that the evidence showed had been used in a previous North Carolina murder, defendant shot the trooper at virtually point-blank range at least six times to avoid arrest. Several of the bullet wounds, according to the evidence, probably were the result of ricochet, indicating that the trooper may have been fired upon while lying on the pavement. These and other factors surrounding the killing amply proved premeditation.

Lastly, defendant contends that the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor, and is excessive or disproportionate to the penalty imposed in similar cases. We do not agree.

As we have said, the jury fixed defendant's sentence at death on the capital murder conviction upon the "vileness" predicate. Defendant points to no meaningful basis for concluding that the determination was made arbitrarily. He merely says the "verdict is irreparably tainted by the error-filled process that produced it" and he is "not a person who deserves to die." On the contrary, the record amply supports the conclusion that the sentence was appropriate under the circumstances.

On the question of "vileness," the jury found that defendant's conduct in committing the offense involved "depravity of mind and/or aggravated battery." Both of these components of the vileness predicate were established. For example, defendant, in an attempt to avoid arrest, shot the trooper at least six times from close range with a high-powered revolver, two of the shots being independently fatal, under the evidence. The officer posed no threat to defendant in connection with this routine traffic stop; the trooper died with his service revolver still enclosed in its holster. Then, the defendant left and returned to the scene, falsely claiming that he attempted to render assistance to the victim when his real purpose was to retrieve incriminating evidence.

On the question of excessiveness and disproportionality, we determine whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant. Code § 17-110.1(C)(2); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). To assist in this determination, we consider records of all capital murder cases reviewed by this Court, including cases where life imprisonment has been imposed. Code § 17-110.1(E).

In *Smith v. Commonwealth*, 239 Va. 243, 271, 389 S.E.2d 871, 886, *cert. denied*, 498 U.S. 881, 111 S.Ct. 221, 112 L.Ed.2d 177 (1990), referring to *Delong v. Commonwealth*, 234 Va. 357, 372, 362 S.E.2d 669, 677 (1987), *cert. denied*, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 263 (1988), we

compiled capital cases involving murders of police officers. *See Eaton, supra*. And, today in *Cardwell v. Commonwealth*, 248 Va. 501, 450 S.E.2d 146 (1994), we referred to those cases where, as here, the death sentences were based upon the vileness factor. From a consideration of all these cases, we conclude that the death sentence in this case is not excessive or disproportionate to the punishment generally imposed by juries in the Commonwealth for similar conduct.

Consequently, we hold the trial court committed no reversible error, and we have independently determined from a review of the entire record that the sentence of death was properly assessed. Thus, the judgment of the trial court will be

Affirmed.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

[Caption Omitted In Printing]

* * *

trial would have been different with respect to guilt and/or sentence.

515. The trial court's error was substantial and had an injurious effect or influence in determining the outcome of Mr. Weeks' trial with respect to guilt and/or penalty.

XXVIII.

THE TRIAL COURT'S REFUSAL TO CLARIFY ITS IMPROPER AND CONFUSING INSTRUCTIONS REGARDING THE IMPOSITION OF A DEATH SENTENCE WHEN EXPRESSLY ASKED BY THE JURORS FOR CLARIFICATION DENIED MR. WEEKS' RIGHTS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

516. The substantive aspects of this claim are exhausted because they were presented on direct appeal; the ineffective assistance aspects of this claim are defaulted because they were not raised in state habeas. To the extent the claim was not adequately raised on direct appeal, the failure to exhaust is attributable to the ineffective assistance of trial/appellate counsel. The performance of trial/appellate counsel, both as a claim in its own right and as cause for the default of any part of the claim on direct appeal, may be addressed by this Court because of the due process violations in state habeas

proceedings, as described previously in this petition. This claim is evidenced by the following facts:

This claim is evidenced by the following facts: [sic]

517. All other allegations in this petition are incorporated into this claim by specific reference.

518. Mr. Weeks requested that jurors be accurately instructed that they could sentence Mr. Weeks to life imprisonment even though they may find unanimously and beyond a reasonable doubt one or both of the statutory aggravating circumstances. (Appendix at 901.) The trial court refused to instruct the jurors on this accurate statement of the law.

519. Instead, the trial court told jurors:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death; or, if you believe from all the evidence that the death penalty is not justified, the [sic] you shall fix the punishment of the defendant at life imprisonment, or imprisonment for life and a fine of a specific amount, but not more than $100,000.
>
> If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment, or imprisonment for life and a fine of a specific amount, but not more than $100,000.

(Appendix at 2263-64.)

520. Although the jurors were given a written copy of this instruction as well as the jury verdict form, they interrupted their deliberations to ask expressly the trial court:

> If we believe that Lonnie Weeks, Jr., is guilty of at least one of the aggravating alternatives, then is it our duty as a jury, to issue the death penalty? or, must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty or one of the life sentences? What is the rule? Please clarify.

(Appendix at 2718.) Although the trial court still had available Mr. Weeks' proposed instruction and although the court knew or should have known that a Virginia jury never has a duty to impose a death sentence, he erroneously told jurors he could do no more than refer them back to the very instruction upon which they sought clarification. (Appendix at 2718.)

521. Mr. Weeks' instruction clearly was a correct statement of Virginia law. In Virginia, a person convicted of capital murder is not *eligible* for a death sentence as a threshold matter, unless the Commonwealth proves unanimously and beyond a reasonable doubt at least one of two statutorily-defined aggravating circumstances. Va. Code §§ 19.2-264.4.C. If the sentencer makes such a threshold finding, the person is eligible for a death sentence. After making this eligibility determination, the sentencer, in Mr. Weeks' case "[t]he jury[,] has the duty to consider all the evidence relevant to sentencing . . . *before determining* whether the defendant . . . should be executed." *Stamper v. Commonwealth*, 257 S.E.2d 808, 819 (Va. 1979), *cert. den.* 445 U.S. 972 (1980) (emphasis supplied).

In no circumstance, is a sentencer *required* to impose a death sentence. *Smith v. Commonwealth*, 219 Va. 455, 479, 248 S.E.2d 135, 150 (1978) *cert. denied*, 441 U.S. 967 (1979).

522. The trial court's instructions, which were the source of the jurors' confusion, were deficient because they told jurors that they could sentence Mr. Weeks to death based merely on a finding of the existence of one or more of the aggravating circumstances and because they were not instructed that they could sentence to life even though they had found the existence of an aggravating circumstance unanimously and beyond a reasonable doubt.

523. Clearly, under this first alternative –

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the Defendant at death

–jurors were expressly told that they were permitted to sentence Mr. Weeks to death merely by finding one of the aggravating circumstances. They need not even consider the second alternative. No reasonable juror could glean from this instruction that the death penalty was not permitted solely on the basis of a finding of an aggravating circumstance. The statutory finding forms in Virginia do not expressly provide for a finding of only one of the aggravating factors beyond a reasonable doubt and a sentence of life imprisonment; they are therefore violative of the principle enunciated in *Penry, supra*.

524. Even if the instructions might, hypothetically, be adequate to lead jurors through the proper process for

deciding whether to sentence a person to death or to life imprisonment, which Mr. Weeks does not concede, those instructions clearly were inadequate to accomplish that task for the jurors in Mr. Weeks' case. The jurors had the court's prior instructions and the verdict form at hand, and if they had been able to determine their options and their duties from those documents, they would not have asked the court for clarification. In the face of actual confusion by the jurors, it was unreasonable and a gross violation of Mr. Weeks' rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution for the court to refuse to give the jurors a straightforward and accurate answer to their plea for clarification. The judge's knowledge that at least some of the jurors believed they had a duty to sentence Mr. Weeks to death based solely on the finding of an aggravating factor, and without consideration of whether a life sentence was appropriate, made his error even more outrageous.

525. The court's error in failing to clarify the rule of law with accurate information in the face of juror confusion and misunderstanding, violated Mr. Weeks' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

526. The failure to present Mr. Weeks' proposed instruction C1 in answer to the jurors' question violated Mr. Weeks' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

527. The unreasonable action of the trial court had the effect of rendering the assistance of Mr. Weeks' counsel ineffective in the defense of Mr. Weeks, thereby violating Mr. Weeks' rights under the Sixth Amendment of the Constitution.

528. A reasonable probability exists that, absent counsel's deficient performance occasioned by the trial court's error, the outcome at trial would have been different with respect to guilt and/or sentence.

529. Alternatively, Mr. Weeks' trial counsel rendered ineffective assistance in the defense of Mr. Weeks by failing to make an adequate showing that the court's response to the jurors' question was inadequate to protect Mr. Weeks' rights. Counsel's ineffective assistance violated Mr. Weeks' rights under the Sixth Amendment to the Constitution. A reasonable probability exists that, absent counsel's deficient performance, the outcome at trial would have been different with respect to guilt and/or sentence.

530. The trial court's error was substantial and had an injurious effect or influence in determining the outcome of Mr. Weeks' trial with respect to guilt and/or penalty.

XXIX.

THE TRIAL COURT'S UNREASONABLE REFUSAL TO IMPOSE A LIFE SENTENCE DEPRIVED MR. WEEKS OF DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL, AND A FAIR TRIAL AND SUBJECTED HIM TO CRUEL AND UNUSUAL PUNISHMENT UNDER THE UNITED STATES CONSTITUTION

531. The substantive aspect of this claim is exhausted because it was addressed on direct appeal; the ineffective assistance aspect of this claim is defaulted because it was not raised in state habeas. To the extent the substantive aspect of this claim was not adequately raised on direct appeal, the failure to exhaust is attributable to the ineffective assistance of trial/appellate counsel. The performance of trial/appellate counsel, in turn, may be addressed by this Court because of the due process violations in state habeas proceedings, as described previously in this petition. This claim is evidenced by the following facts:

This claim is evidenced by the following facts:

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Caption Omitted In Printing]

* * *

163.7, which mandates appointment of qualified state habeas counsel. Thus, even if Weeks did not have a Sixth Amendment right to state habeas counsel, he had a Fourteenth Amendment right to due process. The due process violation excuses the procedural default.

PRINCIPLES OF LAW AND ARGUMENT

I. ONCE THE JURY INFORMED THE TRIAL COURT THAT THEY WERE INTERPRETING THE INSTRUCTIONS TO SAY THEY WERE REQUIRED TO SENTENCE WEEKS TO DEATH UPON THE FINDING OF AN AGGRAVATING CIRCUMSTANCE, THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY CLEARLY THAT THEY WERE OBLIGED TO CONSIDER RELEVANT MITIGATING EVIDENCE BEFORE MAKING THEIR SENTENCING DETERMINATION CREATED A REASONABLE PROBABILITY THAT THE JURY INTERPRETED THE INSTRUCTIONS IN A WAY THAT PREVENTED THE CONSIDERATION OF CONSTITUTIONALLY RELEVANT EVIDENCE.

Weeks' jury received the standard Virginia Pattern Jury Instruction regarding the process by which to make its sentencing determination. (JA at 264.) Last term, the Supreme Court held that an identical instruction, on its face, did not foreclose the jury's consideration of any mitigating evidence, nor did it constrain the manner in which the jury was able to give effect to mitigation.

Buchanan v. Angelone, 118 S. Ct. 757, 762 (1998). Three justices dissented, reasoning that the language in paragraph 3 (which begins "If you find from the evidence . . . "), in the context of the entire instruction, could be misinterpreted by a jury to mean that evidence of mitigating circumstances is not relevant to their sentencing decision. *Id.* at 764-766 (Breyer, J., dissenting). The majority asserted that the instruction as a whole "presents a simple decision tree" and only a "strained parsing of the language" could lead to the misconception envisioned by the dissent. *Id.* at 762 n.4. Weeks' jury would have agreed with the dissent.

After having been given a written copy of the court's instructions and deliberating for nearly four hours, Weeks' jurors requested the court to "clarify" whether they were required to consider any mitigation evidence if they found Weeks guilty of even one aggravating factor:

> If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the aggravating alternatives, then is it our duty as a jury to *issue* the death penalty? Or must we *decide* (even though he is guilty of 1 of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify.

(JA at 256) (emphasis in original). Over trial counsel's objection[1], the trial court gave the jurors no further guidance, but instead referred them to the "second paragraph

---

[1] Prior to deliberations, Weeks requested the jury be instructed:

> Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence

of instruction #2, (Beginning with "If you find from . . .)" which reads:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death; or, if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment, or imprisonment for life and a fine of a specific amount, but not more than $100,000.

(JA at 256; 264.) The jury went on to sentence Weeks to death. The transcript records that "a majority of the jurors [were] in tears" as they delivered their sentence. (JA at 2721.)

The jury's question was a simple one. It alerted the trial court that at least some of the jurors were interpreting the instructions in a way that was unquestionably unconstitutional. This question had one, simple, absolutely correct answer – an answer that the trial court failed to provide. This failure created a reasonable probability that the jury sentenced Weeks to death without considering the relevant mitigating evidence proffered in his behalf, in violation of the Eighth and Fourteenth

---

> in mitigation by sentencing the Defendant to life in prison.

(JA at 261.) The trial court denied the instruction. (JA at 1254-55.) When the jury submitted its question, counsel renewed his request that the jury be provided with the proposed instruction.

Amendments to the Constitution of the United States. *Boyde v. California*, 494 U.S. 370 (1990).

A. Standard of Review

This issue was raised on direct appeal and summarily dismissed as meritless without any discussion by the Supreme Court of Virginia:

> In conclusion, defendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. We have considered all the arguments in support of those issues and conclude that none has any merit.

(JA at 474-75.) Because the Virginia Supreme Court failed to make any findings of fact about this claim or to articulate any rationale for its adverse determination, this Court "cannot review that court's 'application of clearly established Federal law', but must independently ascertain" whether the trial court's failure to correct the jury's obvious confusion created a reasonable likelihood that Weeks' jury interpreted their instructions in such a way as to preclude their giving effect to the mitigating evidence put forth in Weeks' behalf. *Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir.1998). The standard of review, therefore, is equivalent to *de novo*. *Id.*

B. The Trial Court's Failure to Ensure Weeks' Jury Understood the Correct Legal Standard Created an Unacceptable Risk that the Jury Determined it Could Not Consider Mitigating Evidence

Ensuring that sentencers consider mitigation is a constitutionally indispensable aspect of the Eighth

Amendment's requirement that the state's capital sentencing scheme be free from the risk of arbitrariness and capriciousness condemned in *Furman v. Georgia*, 408 U.S. 238 (1972). In *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), the Court acknowledged that "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is . . . incompatible with the commands of the Eighth and Fourteenth Amendments." As the Court recognized in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), "it is not enough to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence." Under no circumstances may a sentencer be precluded from giving effect to proffered mitigating circumstances. It matters not whether the barrier to the consideration of mitigating evidence is the result of a state statute[2], jury instructions[3], an evidentiary ruling[4], prosecutorial argument[5], or the sentencing court.[6]

In *Boyde*, the Court held that the test for determining whether jury instructions satisfy these principles is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380; *see also, Johnson v. Texas*, 509 U.S. 350, 367-68

---

[2] *Lockett, supra.*

[3] *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Penry*, 492 U.S. at 319; *Mills v. Maryland*, 486 U.S. 367 (1988).

[4] *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Green v. Georgia*, 442 U.S. 95, 99 (1979).

[5] *Penry*, 492 U.S. at 326.

[6] *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

(1993); *Buchanan*, 118 S.Ct. at 761. In making this determination, courts should consider the language of the challenged instruction in the context of the entire proceedings. *Boyde*, 494 U.S. at 373-74.

In this case, at the time the jury asked the question, there was indeed "a reasonable likelihood" that the jury intended to apply the instruction in a way that prevents the consideration of constitutionally relevant evidence. The jury's question specifically told the judge that it did not know whether it was even *permitted* to consider any mitigating evidence once it found the existence of an aggravating factor. The only question is whether the trial court's response to this question, which was simply to refer the jury to the original charge – i.e., to the instruction that was the source of the confusion – was sufficient to eliminate this possibility.

The District Court said that because the instruction was "constitutionally sufficient" on its face, the trial judge "could have reasonably assumed that the jury would understand their charge if their attention were brought to the specific instruction that governed their question." (JA at 2100.) The court also assumed that because the jury did not renew the question but proceeded to render a sentence, it must have correctly "understood the instruction and the governing law." (JA at 2100.)

The fact that an instruction is "constitutionally sufficient" on its face merely means that hypothetically reasonable jurors can be presumed to comprehend the instruction accurately. Absent specific evidence of confusion, courts may safely assume that the jurors understand

the charge and that they will apply the law correctly. But when particular jurors expressly indicate confusion, as they did here, the presumed understanding of hypothetical jurors can no longer be imputed to them.

The court addressed a strikingly similar situation in *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 1575 (1998). McDowell's jury had sent a question to the judge indicating that it could not agree whether certain factors could be considered in mitigation. *Id.* at 835. The judge simply referred the jury back to what all parties agreed was a "technically flawless" instruction. *Id.* at 838. The *en banc* court reasoned that because the jury had failed to understand the instruction in the first instance, "it would be folly to presume . . . that in the end they got it right and followed the law." *Id.* at 839. Thus, that court concluded that the failure to correct the jury's obvious misunderstanding left a reasonable likelihood that the jury had incorrectly interpreted the instruction to preclude consideration of mitigating evidence, and it reversed McDowell's death sentence. *Id.* at 841. The circumstances in Weeks' case warrant the same conclusion.

First, the fact that the instruction at issue was found "constitutionally sufficient" on its face in *Buchanan* is not relevant to the resolution of Weeks' claim. *This* jury was prepared to interpret the instruction in an unconstitutional manner. While referring a jury back to an instruction may be reasonable in some circumstances, no likelihood exists that this was an instance where the jury had merely failed to focus upon the proper instruction to resolve their difficulty. The penalty phase instructions were short, and only one of those instructions described

the process by which jurors were to arrive at a sentencing determination. Having pored over the written instructions for nearly four hours, there was no reason for these jurors to inquire whether they were permitted to consider mitigating evidence if they understood the instruction as given. Weeks' jury found the instruction confusing and misleading and "the error is not cured by a prior unexceptional and unilluminating abstract charge." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946).

Moreover, while the fact that the jury did not renew their question and eventually arrived at a sentencing determination may indicate that the jury resolved their question – it hardly demonstrates that the jury unanimously determined to interpret the instruction *correctly*.[7] The jury at least as likely unanimously determined that their "duty" was to sentence Weeks to death upon the finding of an aggravating circumstance, without consideration of mitigating evidence. The ultimate sentence – death – does not indicate otherwise. Nor does the fact that the jury, upon sentencing Weeks to death, left the courtroom weeping. Indeed, these facts make it *more* likely that the jury ultimately resolved the question in an unconstitutional manner.

Had the jury been resolved to sentence Weeks to death even after considering the mitigating evidence

---

[7] The jury had twice asked the trial court for clarification, first regarding Weeks' parole eligibility and then whether it was their "duty" to impose the death sentence after finding an aggravating factor. After receiving no clarification to either question, that the jurors would have considered returning to the trial court with a repeat of their second question is unlikely.

before it, there was no reason to bother with the question. The only possible reason to interrupt deliberations to ask this question was if the answer would make a difference. The only difference it could have made was a determination, in the mind of at least one juror, that there were mitigating circumstances and that Weeks should not be sentenced to death. Such a determination by even one juror would have resulted in a life sentence. Va. Code § 19.2-264.4

"[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Bollenbach*, 326 U.S. at 612 (quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933)). For this reason, "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Id.* at 612-13. The jurors' question alerted the court to the very real possibility that they would impose the death penalty without considering mitigating evidence. The answer here was easy and controlled by a clearly established and long-standing constitutional requirement as articulated by the Supreme Court.

The judge could have easily and accurately resolved the jury's misunderstanding by giving Weeks' proposed instruction. That instruction correctly stated the law and was responsive to the jurors' question. In fact, the District Court said, "Weeks' proposed jury instruction is certainly a clearer statement of the law than the instruction actually given to the jury." (JA at 2096.)

The judge could have also resolved the misunderstanding by simply answering the question: "No" (it is

not your duty to impose the death penalty just because you find Weeks guilty of at least one of the alternatives); and "Yes" (you must decide, even if he is guilty of one of the alternatives, whether or not it is appropriate to impose the death penalty or one of the life sentences). Merely referring the jury back to an instruction that it did not understand in the first place did nothing to dispel the jurors' obvious confusion as to whether they were permitted to consider Weeks' mitigating evidence once they found an aggravating factor. By effectively withholding from the jury the correct standard by which they were to reach a sentencing determination, the trial court unconstitutionally diminished the reliability of the jury's decision.

For the foregoing reasons, there can be no assurance that Weeks' jury took into account "factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605. Thus, under clearly established law as decided by the Supreme Court, "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380, *Buchanan*, 118 S. Ct. at 761. Accordingly, Weeks' death sentence should be vacated and this case remanded for a new penalty phase.

II. THE TRIAL COURT'S REFUSAL TO APPOINT BALLISTICS AND PATHOLOGY EXPERTS DEPRIVED WEEKS OF HIS CONSTITUTIONAL RIGHTS.

A. This Claim Was Presented but Not Adjudicated on the Merits in State Court

The trial court's unreasonable refusal to appoint ballistics and forensic pathology experts to

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
[Caption Omitted In Printing]

* * *

I. THERE IS A REASONABLE LIKELIHOOD THAT WEEKS' JURY APPLIED THE PENALTY INSTRUCTIONS IN A WAY THAT PREVENTED CONSIDERATION OF CONSTITUTIONALLY RELEVANT MITIGATING EVIDENCE

A. Weeks' Claim is Not Procedurally Barred

Respondent's contention that the state court made an "explicit rejection of assignment of error no. 44 . . . as procedurally defaulted," Resp. Br. at 11 n.1, is false. On direct appeal, the state court addressed this claim not once, but twice. On both occasions, the court rejected Weeks' 44th Assigned Error *on the merits*. There is no procedural bar, as the district court correctly concluded.

First, the Virginia Supreme Court stated, "[Weeks] effectively presents no argument in support of five other alleged errors (Nos. 16, 34, 44, 45 and 46)." *Weeks v. Commonwealth*, 540 S.E.2d at 379, 383 (Va. 1994). Respondent fails to mention that the court immediately went on to conclude, "[w]e have considered these so-called arguments and *find no merit* in any of the five." *Id.* (emphasis supplied). Thus, even if the state court could have barred the claims for failure to present an adequate argument, it plainly did not do so. *See Harris v. Reed*, 489 U.S. 255 (1989) (where state court chose not to impose procedural bar, federal court must address merits.)

At the conclusion of its opinion, the state court again addressed Error 44, and again concluded that the claim had no merit:

> In conclusion, defendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and *inquiries by the jury during its deliberations*. We have considered all the arguments in support of those issues and conclude that none has any merit.

Weeks, 540 S.E.2d at 390 (emphasis supplied). Weeks' jury only "inquired" twice, and there were only two issues raised on appeal concerning an inquiry by the jury (Assignments of Error 43 and 44). Because the court specifically used the plural and stated it was resolving issues dealing with "inquiries," the court must have been addressing both issues. Indeed, such was the conclusion of the district court, which reviewed Weeks' claim on the merits. (JA 2099.)[1]

B. Weeks Is Not Asking the Court to Create a "New Rule"

Respondent also asserts, for the first time on appeal, that Weeks' claim calls for this Court to establish a "new rule" under *"Teague* and its progeny." Resp. Br. at 12. The

---

[1] Respondent also appears to assert, for the first time on appeal, that Petitioner's claim was not fairly presented in the state courts. Resp. Br. at 11. However, this assertion is so vague and conclusory that it fails to divulge what "legal and factual claims" Respondent believes are "newly advanced" in federal habeas proceedings. Thus, Weeks cannot reasonably respond to this argument and this Court should not address it.

crux of this argument appears to be that because the instructions and circumstances of Weeks' trial were similar to those later considered by the Supreme Court in *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), only a "new rule" would entitle Weeks to relief. If Buchanan was not seeking to establish a new rule, and he was not, then *a fortiori* Weeks is not. *Compare* Respondent's Supreme Court Brief in *Buchanan v. Angelone*, 1997 WL 476496 at ** 37-45 (arguing as threshold matter that Buchanan is not entitled to relief under "new rule" doctrine), *with Buchanan v. Angelone*, 118 S. Ct. 757 (1998) (declining to apply "new rule" principles and deciding issue on merits).

Weeks, like Buchanan, merely seeks the application of a clearly established rule – the sentencing jury in a capital trial may not be precluded from considering relevant mitigating evidence – *to the particular circumstances of his case. See Id.*, 118 S. Ct. at 761-62 (applying those "constitutional principles" dictated by *Lockett, Eddings, Penry* and *Boyde* to the particular circumstances of Buchanan's trial). The Supreme Court's approval of the sentencing instructions in *Buchanan* does not preclude this Court from considering Weeks' claim any more than the Court's approval of the Texas jury instructions in *Jurek v. Texas*, 428 U.S. 262 (1976), precluded Penry from obtaining relief based on a similar claim nearly a decade ago. *Penry v. Lynaugh*, 492 U.S. 302, 316 (1989) (claim that assurances of *Lockett* and *Eddings* were not fulfilled under particular circumstances of Penry's case is not a "new rule.").

Moreover, in comparing the circumstances of Weeks' case to those present in Buchanan's case, Respondent

omits one rather significant dissimilarity: after four hours of deliberation Weeks' jury actually told the court they were, in fact, considering interpreting the instructions in an unconstitutional manner.[2] This was not the case with Buchanan's jury. Indeed, the Court made clear in *Buchanan* that its ruling was predicated on the absence of any proof of juror confusion. *Buchanan*, 118 S. Ct. at 763.

Weeks is not asserting, as Respondent suggests, that a trial court *per se* acts unconstitutionally by referring the jurors to previously given instructions. Rather, Weeks' claim is that, when the jury informed the court they thought the rule might be that they had a "duty" to sentence Weeks to death upon finding one of the aggravating factors, there was "a reasonable likelihood that the jurors in petitioner's case understood the challenged instructions to preclude consideration of relevant mitigating evidence offered by petitioner," and that the trial court's response was insufficient under the circumstances to dispel the possibility. *Boyde v. California*, 494 U.S. 370, 386 (1990). Although this may only be a matter of phrasing, "phrasing mirrors thought, [and] it is important that the phrasing not obscure the true issue before a federal court." *Brown v. Allen*, 344 U.S. 443, 501 (1953).

The jury's inquiry and the trial court's response are circumstances, unlike those in *Buchanan*, which evince a

---

[2] Respondent does mention the fact that the jury asked a question in a footnote to his argument. However, Respondent attempts to diminish its significance by characterizing it as "merely . . . a question about its sentencing options." Resp. Br. at 15 n. 3. The language of the jury's question, which is quoted in full in Weeks' opening brief, speaks for itself.

violation of the well-established constitutional rule Weeks sought to be applied. *See Simmons v. South Carolina*, 114 S. Ct. 2187, 2197 n.10 (1994) ("It almost goes without saying that if the jury in this case understood . . . the 'plain meaning' [of the terms in the instruction] there would have been no reason for the jury to inquire [as to their meaning]."); *id.* at 2199 (Souter, J., concurring) ("It is . . . clear that at least one of these particular jurors did not understand the meaning of the term, since the jury sent a note to the judge asking [the court to define the term]."); *id.* at 2201 (Ginsberg, J., concurring) ("that the jury in this case felt compelled to ask" about the meaning of the instruction "shows" that the jurors did not understand the term).[3]

C. The Error Was Not Harmless

In *Calderon v. Coleman*, ___ S. Ct. ___, 1998 WL 856120 (Dec. 14, 1998) (per curiam), the Court remanded a case to the court of appeals because the lower court, after determining that an erroneous jury instruction was unconstitutional under *Boyde*, failed to assess whether the error was harmless. Weeks does not concede that *Coleman* applies to the circumstances of his case, but in an abundance of caution he shows that the error in his case "ha[d] a substantial and injurious effect or influence on the jury's sentence of death." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

---

[3] Respondent's related attempt to derail Weeks' claim under 28 U.S.C. § 2254(d) is unavailing. Under this Court's decision in *Cardwell v. Greene*, 152 F.3d 331 (4th Cir. 1998), review of this claim must be equivalent to *de novo*.

The decision in *Simmons* established that inquiries from juries indicate that some jurors do not understand their instructions. 114 S. Ct. at 2197 n.10. As explained above and in Weeks' principal brief, there would be no logical reason for jurors to seek clarification unless resolution of the questions would make a difference in the outcome. Thus, Weeks offers compelling proof that the error had a substantial and injurious effect or influence on the jury's decision: the jurors said so.

Unlike the circumstances in *Coleman*, where the error was very attenuated,[4] the error in Weeks' case went to the heart of the sentencing decision. At least one juror must have found an aggravating factor but nonetheless concluded that Weeks should be sentenced to life imprisonment – otherwise, an answer to the jury's question would not have made any difference and they would not have sought clarification. For the reasons shown in Weeks' principal brief, we cannot presume that the jury, left on its own, correctly determined that it did *not* have a duty to impose death and that it was prohibited from imposing a death sentence without each juror first considering the

[4] In *Coleman*, the jury was instructed that the governor of California is empowered to commute a life sentence without the possibility of parole to a lesser sentence that includes the possibility of parole. The federal court granted habeas relief because the jury was not also told that the governor could not commute the sentence of a twice-convicted felon like Coleman without the approval of four judges of the California Supreme Court. In the context of future dangerousness, this omission purportedly prevented the jury from giving due effect to Coleman's mitigating evidence.

mitigating evidence. Indeed, even Respondent does not suggest that the jury could perform such a feat.

II. WEEKS' CLAIM THAT HE WAS UNCONSTITUTIONALLY DENIED THE ASSISTANCE OF EXPERTS IS NOT DEFAULTED, IS NOT BARRED BY THE "NEW RULE" DOCTRINE, AND IS NOT HARMLESS ERROR

In his 12th Assigned Error on direct appeal, Weeks presented his federal claim to the Virginia Supreme Court: "The court's denial of the defendant's request for funding for expert assistance in the fields of pathology and ballistics constituted a violation of the defendant's rights guaranteed by . . . the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States." (JA at 428.) Respondent's contention that Weeks advanced no such federal claim on direct appeal is thus demonstrably wrong. The state court simply did not adjudicate the merits of Weeks' properly presented claim and instead addressed only Weeks' separate claim concerning the right to proceed *ex parte*. *See Smith v. Digmon*, 434 U.S. 332, 333 (1978) (federal claim is exhausted if presented to state's highest court, regardless whether state court chooses not to address merits).[5] Using an artfully truncated quote, Respondent makes *Adams v. Robertson*, 117

[5] *Digmon* refutes Respondent's argument that when the state court fails to adjudicate a properly presented claim, the defendant *must* move for rehearing. When state law makes a motion for rehearing discretionary, "[t]here is no requirement that a litigant petition for rehearing after an appellate court issues a final decision . . . in order to preserve his right to pursue federal habeas relief. . . . 'The decision of the [state's highest court] was final state action, without a useless motion for

S. Ct. 1028 (1997), appear to say the opposite of what the Court held. Read in full, *Adams* supports Weeks' position:

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption *by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here."* We have described in different ways how a petitioner may satisfy this requirement. In some cases, we have focused on the need for petitioners either to establish that the
>
> * * *

discretionary review.' " *Tuggle v. Seabold*, 806 F.2d 87, 91 (6th Cir. 1986) (quoting *Freeman v. Commonwealth*, 697 S.W.2d 133, 134 (Ky. 1985)).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
[Caption Omitted In Printing]

* * *

Pursuant to United States Supreme Court Rule 23(3) and Local Rule 22(b) of the Rules of the United States Court of Appeals for the Fourth Circuit, Appellant Lonnie Weeks, Jr., by counsel, hereby moves this Court to recall its mandate and to issue an order staying Weeks' execution, which is scheduled for September 1, 1999, until the Supreme Court enters final judgment or denies Weeks' application for writ of certiorari. Counsel for Mr. Weeks has notified opposing counsel of the intended filing of the motion. Opposing counsel has not consented to the granting of the motion and likely will file a response in opposition to the motion. As grounds and support for this motion, Weeks states as follows:

In his petition for writ of certiorari, Weeks will ask the Supreme Court to determine whether a trial court has a duty under the Eighth and Fourteenth Amendments to clarify a jury's explicit confusion about the meaning of a facially constitutional instruction in order to obviate the likelihood that the jury will conduct its task improperly and apply the sentencing instruction in a way that precludes consideration of constitutionally relevant mitigating evidence.

This application is governed by the familiar criteria set out in *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Barefoot* requires an applicant to show (i) a reasonable probability that four Members of the Court will consider the issues raised in the petition sufficiently meritorious for a grant

of certiorari, (ii) the significant possibility that the Court will reverse the decision below, and (iii) that irreparable harm will occur if the execution is not stayed. *Id.*, 463 U.S. at 895.

I. There Is a Reasonable Probability That Four Members of the Court Will Consider the Issue Raised in Weeks' Petition Sufficiently Meritorious for a Grant of Certiorari

There are at least two reasons why there is a reasonable probability that four Members of the Court will vote to grant certiorari to decide whether a trial court is bound by the Constitution to clarify a capital sentencing jury's explicit confusion over its instructions. First, this case presents an important and unresolved question of federal law that was raised by three dissenting justices of the Court in *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), and the question should be settled by the Court. Second, there is a split in the Circuit Courts of Appeals regarding whether a trial court must clarify a capital jury's confusion over its instructions in order to prevent the likelihood that the jurors will apply the instruction in a way that precludes their consideration of mitigating evidence.

In *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), the Court held that a capital sentencing instruction almost identical to the one used by Weeks' jury did not, on its face, foreclose the jury's consideration of any mitigating evidence. 118 S. Ct. at 762. The Court reasoned that, after two days of hearing mitigating evidence presented by Buchanan, "it is not likely that the jury would disregard this extensive testimony in making its decision. . . . " *Id.*

Thus, the Court concluded *"[i]n this context* 'there is not a reasonable likelihood that the jurors *in the petitioner's case* understood the challenged instructions to preclude consideration of relevant mitigating evidence. . . . " *Id.* at 763 (emphasis added). Significantly, the context of the proceedings in *Buchanan* reveal that there was no explicit confusion over the instructions expressed by the jury. An important question not directly addressed by the majority in *Buchanan* is whether a trial court is bound by the Constitution to clarify a jury's explicit confusion over its constitutionally-sufficient instructions.

Three justices dissented from the majority's opinion in *Buchanan*, reasoning that Virginia's capital sentencing instruction was capable of being misinterpreted by a jury to mean that evidence of mitigating circumstances is not relevant to their sentencing decision once the jury finds the presence of one of the statutory aggravating factors. *Id.* at 764-766 (Breyer, J., dissenting). Precisely the misunderstanding predicted by the dissenters in *Buchanan* has arisen in Weeks' case.

Weeks' jurors asked the judge for clarification of the rule of law.[1] Without giving the jurors any further concrete guidance or clarification of the rule of law the judge simply referred them back to the instruction which was

---

[1] The question posed by the jury to the court reads: "If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the aggravating alternatives, then is it our duty as a jury to issue the death penalty? Or must we decide (even though he is guilty of 1 of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify." (R. at 256 and 1342-43) (emphasis in original.)

the source of their confusion. The jury's inquiry and the trial court's response are circumstances, dramatically unlike those in *Buchanan*, which reveal a violation of the well-established constitutional rule Weeks sought to be applied; a capital jury may not be precluded from considering constitutionally-relevant mitigating evidence. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978). There is a reasonable probability that four Members of the Court will vote to grant certiorari in order to answer this important question of federal law.

There is also a reasonable probability that four Members of the Court will vote to grant certiorari because there is a split in the circuits regarding whether a trial court must clarify a jury's manifest confusion over technically flawless instructions in order to prevent the likelihood that the jurors will apply the instruction in a way that precludes their consideration of mitigating evidence. In *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 1575 (1998), the Ninth Circuit was faced with the same constitutional question regarding jury confusion as the Fourth Circuit. Weeks discussed the *McDowell* decisions at length in his briefs, but this Court's Opinion ignored the *McDowell* precedent. The Fourth Circuit's ruling directly conflicts with

* * *

Lonnie WEEKS, Jr., Petitioner-Appellant,

v.

Ronald J. ANGELONE, Director of the Virginia Department of Corrections, Respondent-Appellee.

No. 98-21.

United States Court of Appeals, Fourth Circuit.

Argued March 1, 1999.

Decided May 10, 1999.

ARGUED: Timothy Meade Richardson, Huff, Poole & Mahoney, P.C., Virginia Beach, Virginia, for Appellant. Robert H. Anderson, III, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellee. **ON BRIEF:** Glen A. Huff, Huff, Poole & Mahoney, P.C., Virginia Beach, Virginia; Sterling H. Weaver, Sr., Portsmouth, Virginia, for Appellant. Mark L. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellee.

Before WILKINSON, Chief Judge, and HAMILTON and WILLIAMS, Circuit Judges.

Application for a certificate of appealability denied and petition dismissed by published opinion. Judge WILLIAMS wrote the opinion, in which Chief Judge WILKINSON and Judge HAMILTON joined.

OPINION

WILLIAMS, Circuit Judge:

On October 21, 1993, a Commonwealth of Virginia jury convicted Lonnie Weeks, Jr., of the capital murder of Virginia State Trooper Jose Cavazos. Following the jury's determination that Weeks's conduct satisfied the "vileness" aggravating factor, the trial court sentenced Weeks to death. After exhausting all available state remedies, Weeks petitioned the United States District Court for the Eastern District of Virginia for habeas corpus relief. *See* 28 U.S.C.A. § 2254 (West 1994 & Supp.1998). The district court dismissed his petition. Weeks subsequently filed an application for a certificate of appealability with this Court raising numerous constitutional claims of error. Weeks argues, *inter alia*, that the trial court's refusal to clarify its capital sentencing instruction to the jury after they indicated confusion with the instruction prevented the consideration of relevant mitigating evidence in violation of the Eighth and Fourteenth Amendments, that the trial court's refusal to appoint ballistics and pathology experts violated his due process rights under the Fourteenth Amendment, and that the Supreme Court of Virginia's refusal to suppress his confession to the murder of Trooper Cavazos violated his Fifth and Fourteenth Amendment rights. After reviewing the record and briefs and hearing oral argument, we conclude that Weeks has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C.A. § 2253(c)(2) (West Supp.1998). Accordingly, we deny his application for a certificate of appealability and dismiss his petition.

I.

The undisputed facts of this case, as recited by the Supreme Court of Virginia, are as follows:

> In early February 1993, [Weeks], who was age 20, a North Carolina resident, and on probation for a 1992 drug conviction, participated in the burglary of a residence in the Fayetteville, North Carolina area. During the course of that crime, [Weeks] obtained a set of keys to a 1987 Volkswagen Jetta automobile parked at the residence, and stole the vehicle. Later that month, [Weeks] drove the vehicle to Washington, D.C., intending to sell it or trade it for drugs. [Weeks] carried in the vehicle a Glock Model 17, nine millimeter, semi-automatic pistol loaded with hollow-point bullets. According to the testimony, the bullets were designed for police use, not target practice or hunting; this type of bullet is referred to as a "man stopper."
>
> During the late evening of February 23, [Weeks] was riding as a passenger in the vehicle being driven by his uncle, 21-year-old Lewis J. Dukes, Jr., a resident of the District of Columbia. The pair was traveling en route from Washington to Richmond southbound on Interstate Route 95.
>
> Around midnight, Trooper Cavazos was operating radar from his marked police vehicle parked in the highway medium monitoring southbound traffic. The Volkswagen driven by Dukes passed the trooper's position at a high rate of speed. The officer activated his vehicle's emergency lights and proceeded to chase the vehicle occupied by [Weeks]. After traveling a brief distance, and passing other vehicles by

driving on the right shoulder of the highway, Dukes brought the car to a stop on the Dale City exit ramp, in a dark, remote area.

The trooper pulled his patrol car to a stop behind the Volkswagen, which he approached on foot on the driver's side. Upon the officer's request, Dukes alighted and was standing toward the left rear of the Volkswagen when the trooper asked [Weeks] to step out of the vehicle.

[Weeks] complied with the officer's request and alighted on the right side of the vehicle as the trooper was near the left side. As [Weeks] left the vehicle he was carrying the fully loaded pistol. He then fired at least six bullets at the officer, two of which entered his body beside the right and left shoulder straps of the protective vest the trooper was wearing. The officer was immediately rendered unconscious and fell to the pavement, dying within minutes at the scene with his police weapon in its "snapped" holster.

[Weeks], with Dukes as a passenger, then drove the Volkswagen from the scene and parked it on the lot of a nearby service station. [Weeks] returned to the scene of the crime on foot and retrieved Dukes' District of Columbia driver's license that had been dropped on the pavement. [Weeks] rejoined Dukes, and they were found by police shortly thereafter in the parking lot of a nearby motel.

. . . .

About 2:45 a.m., after [Weeks] had been with [the Prince William County police officer who had first encountered Weeks in the motel parking lot] for about two hours, state police officers arrived to question [Weeks] and Dukes.

Near 3:00 a.m., state police Special Agent J.K. Rowland met [Weeks] in the motel lobby. Rowland "explained to him that he was not under arrest" and asked [Weeks] "if he would like to talk . . . about what he had seen up on Interstate 95." [Rowland], who . . . testified [that Weeks] was "free to leave at that time," conducted an interview with [Weeks] in private in one of the motel rooms.

. . . .

[A]s Rowland questioned [Weeks] in the motel room, Rowland became "more and more suspicious" of [Weeks]. Even though [Weeks] "was free to leave" at that point, Rowland advised [Weeks] of his constitutional rights according to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as a precaution at 7:40 a.m. [Weeks] then exercised his right to remain silent and wrote, "Do not want to discuss case any further," on the "Advice of Rights" form that he signed. Rowland honored this request, and ceased questioning.

At 7:50 a.m., Rowland was advised by another investigator that Dukes had just stated that [Weeks] shot the trooper. Rowland arrested [Weeks] at 7:52 a.m.

Subsequently, [Weeks] was taken before a magistrate and then to the Adult Detention Center in Manassas. Later that morning, classification officers in the jail routinely questioned [Weeks] about his physical and mental state; no attempt was made to elicit information about the crime. During the interview, [Weeks] indicated that he was considering suicide because he had shot the trooper. [Weeks] also voluntarily

wrote a letter to a jail officer admitting the killing and expressing remorse. [Weeks] does not contest either of these admissions but attacks the constitutional validity of the following interview.

Near 6:00 p.m. on February 24, [Weeks] was brought to the lounge of the local prosecutor's office where Rowland again interviewed him; additional information had been developed by the police during the day between the termination of the first interview and the beginning of the second interview. Rowland asked [Weeks], "Do you remember the rights I read to you earlier today?" to which [Weeks] responded affirmatively. Rowland proceeded "to summarize the investigation through the course of the day's events to that point in time."

Among other things, Rowland told [Weeks] that an eyewitness to the shooting had made a positive identification of him as the assailant. A witness actually had identified [Weeks] as a person she saw at the scene after the homicide, but she had not witnessed the shooting. At the conclusion of Rowland's summary, he said to [Weeks], "This is your opportunity to provide your explanation as to what happened at the shooting scene." [Weeks] responded, "Yes, I was packing." The officer knew that "packing" meant "carrying a firearm."

[Weeks] then confessed to the trooper's murder. [Weeks] stated that when the trooper asked him to get out of the Volkswagen, he picked up the pistol and "thought about throwing it away." Instead, he saw the trooper put his hand down toward his service revolver. [Weeks] said he then "panicked" and shot the victim

"several times rapidly." [Weeks] stated that he drove, with Dukes as a passenger, to the service station, placing the pistol under the front floor mat of the Volkswagen. This interview lasted about one hour during which [Weeks] readily answered questions and did not invoke his right to remain silent or any other constitutional right.

Weeks v. Commonwealth, 248 Va. 460, 450 S.E.2d 379, 382-86 (Va.1994).

After a jury trial in the Circuit Court of Prince William County, Virginia, Weeks was convicted of the capital murder of Cavazos pursuant to Va.Code Ann. § 18.2-31(6) (Michie Supp.1998).[1] Based on its finding – made during the sentencing phase of Weeks's trial – that Weeks's conduct was outrageously or wantonly vile in that it involved depravity of mind and/or aggravated battery to the victim beyond the minimum necessary to commit the murder, *see* Va.Code.Ann. § 19.2-264.4(C) (Michie 1995), the jury recommended that Weeks be sentenced to death. After conducting a post-trial hearing pursuant to Va.Code. Ann. § 19.2-264.5 (Michie 1995), the Circuit Court of Prince William County followed the jury's recommendation and sentenced Weeks to death. On direct appeal, the Supreme Court of Virginia upheld Weeks's conviction and death sentence. *See Weeks*, 248 Va. 460, 450

---

[1] Weeks also pleaded guilty to the use of a firearm in the commission of a murder and a related grand larceny charge, pursuant to Va.Code Ann. §§ 18.2-53.1 and 18.2-95 (Michie 1996 & Supp.1998), respectively, for which he was sentenced to a total of thirteen years in prison. These charges are not at issue on appeal.

S.E.2d 379. The Supreme Court of the United States denied Weeks's petition for a writ of certiorari. *See Weeks v. Virginia*, 516 U.S. 829, 116 S.Ct. 100, 133 L.Ed.2d 55 (1995).

Weeks requested that the Circuit Court of Prince William County appoint counsel to assist him in preparing a state habeas petition. On October 10, 1995, the circuit court granted this request and Weeks's state habeas counsel filed a petition for habeas corpus. On December 1, 1995, state habeas counsel withdrew the petition from the circuit court after learning on that day that the appropriate court with which to file the petition was the Supreme Court of Virginia, because that court has sole jurisdiction over habeas petitions in death-sentence cases. State habeas counsel immediately mailed the petition by regular mail to the Supreme Court of Virginia on December 1, the last day for filing. The petition was filed on December 4, 1995.

On January 11, 1996, the Commonwealth filed a motion to dismiss Weeks's petition as jurisdictionally barred due to untimeliness under Va. Code § 8.01-654.1 and Rule 5:7A(a) of the Rules of the Supreme Court of Virginia. In its motion, the Commonwealth argued that the petition was not timely filed because the Supreme Court of Virginia does not accept pleadings sent in the mail on the last day for filing unless they are sent by certified or registered mail. On that same day, the Commonwealth also filed a motion to dismiss the petition on substantive grounds. On March 15, 1996, the Supreme Court of Virginia dismissed the petition as jurisdictionally barred due to untimeliness.

On April 11, 1996, Weeks filed a petition for rehearing with the Supreme Court of Virginia. Weeks subsequently filed a purportedly *pro se* motion seeking the dismissal of his state habeas attorney for an alleged conflict of interest and leave to file a second habeas petition after the appointment of new counsel. That motion was denied by the Supreme Court of Virginia on May 31, 1996. One week later, on June 7, 1996, the Supreme Court of Virginia denied Weeks's petition for rehearing. On June 28, 1996, the Circuit Court of Prince William County entered an order setting Weeks's execution for August 19, 1996.

On August 14, 1996, Weeks filed a motion in the United States District Court for the Eastern District of Virginia requesting appointment of counsel, a stay of execution, and leave to proceed *in forma pauperis*. These motions were granted. Weeks was ordered to file his petition for writ of habeas corpus on or before February 7, 1997.

Weeks submitted his petition for a writ of habeas corpus in the district court on February 7, 1997. The matter was referred to a magistrate judge for the preparation of a report and recommendation pursuant to 28 U.S.C.A. § 636(b)(1)(B) and (C) (West 1993) and Rule 72(b) of the Federal Rules of Civil Procedure. On July 30, 1997, the magistrate judge filed a report and recommendation, recommending that the petition be denied and dismissed. By opinion and final order of April 1, 1998, the district court granted the Commonwealth's motion for summary judgment and denied and dismissed Weeks's petition for a writ of habeas corpus in its entirety. *Weeks v. Angelone*, 4 F.Supp.2d 497 (E.D.Va.1998). On April 15, 1998, Weeks

moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). The district court denied this motion on June 19, 1998. On July 17, 1998, Weeks filed a timely notice of appeal. On October 16, 1998, Weeks filed an application for a certificate of appealability with this Court pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure.

On appeal, Weeks contends that he is entitled to habeas relief on the following grounds: (1) the trial court's failure to instruct the jury clearly that they were obliged to consider relevant mitigating evidence before making their sentencing determination created a reasonable probability that the jury interpreted the sentencing instructions in a way that prevented the consideration of constitutionally relevant evidence; (2) the trial court's refusal to appoint ballistics and pathology experts deprived him of his constitutional rights; (3) the trial court's failure to suppress evidence derived in violation of his Fifth Amendment right against self-incrimination deprived him of due process; (4) Rule 5:25 is not an adequate procedural bar to his claims that were not raised at trial; (5) the fifty-page brief limit imposed by the Supreme Court of Virginia excuses the procedural default of claims not briefed on direct appeal; and (6) his state habeas counsel's conflict of interest constituted a violation of due process that excused the procedural default of his ineffective-assistance-of-trial-counsel claims. We address Weeks's arguments in turn.

II.

The parties agree that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, governs this case.[2] For a claim that was adjudicated on the merits in state court proceedings, this Court will not issue a writ of habeas corpus under the AEDPA unless (a) the state court decision is in "square conflict" with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, "the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts." *Green v. French*, 143 F.3d 865, 870 (4th Cir.1998). "In other words, *habeas* relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Id.* When a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits, however, our review of questions of law and mixed questions of law and fact is de novo. *See*

---

[2] The AEDPA prohibits federal habeas relief on any claim "adjudicated on the merits in State court proceedings," unless that adjudication resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254(d) (West Supp.1998).

Jones v. Jones, 163 F.3d 285, 299-300 (5th Cir.1998) (applying pre-AEDPA de novo standard of review to claims of ineffective assistance of counsel that were properly raised, but not adjudicated on merits in state court).

III.

First, Weeks argues that the trial court prevented the jury from considering relevant mitigating evidence in violation of *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). Specifically, Weeks points to the failure of the trial court, in response to a specific jury request for clarification, to instruct the jury clearly that it was not required to sentence Weeks to death upon finding at least one aggravating factor. In *Boyde*, the Supreme Court held that the proper inquiry into whether capital jury instructions satisfy the Eighth Amendment requirement that a sentencer give effect to mitigating evidence is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.

A.

During the penalty phase of Weeks's trial, the trial court gave the jury a lengthy sentencing instruction (Instruction # 2).[3] The trial court denied Weeks's proffered instruction, C1, which instructed the jury that it had

[3] Instruction # 2 read as follows:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than $100,000. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> 1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
>
> 2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.
>
> If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

(J.A. at 264.)

the option to give effect to the mitigating evidence and sentence Weeks to life in prison even if it found the

Commonwealth had proved one or both of the aggravating factors beyond a reasonable doubt. During its penalty phase deliberations, the jury asked the court whether it was their duty to issue the death penalty if they found that Weeks was guilty of one of the aggravating factors, or whether they must decide whether or not to issue a death sentence even after finding that one of the aggravating factors had been met. Rather than issuing a clarifying instruction, the trial court instructed the jury by written response to see the second paragraph of Instruction # 2, which read as follows:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you *may* fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you *shall* fix the punishment of the defendant at life imprisonment or imprisonment for live [sic] and a fine of a specific amount, but not more than $100,000.00.

(J.A. at 264 (emphases added).) The trial court overruled Weeks's objection and request that the jury be instructed that it could impose a life sentence upon finding one or both aggravating factors based upon its belief that the jurors "just have to be drawn to that paragraph to find their answer." (J.A. at 1344.) Following several more hours of deliberation, the jury sentenced Weeks to death.

The Supreme Court of Virginia rejected Weeks's claim, contained in assignment of error no. 44, that the trial court's actions prevented the jury from considering relevant mitigating evidence on the ground that Weeks

"effectively presents no argument in support of" his claim. *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 383 (1994). The Commonwealth argues that this dismissal is procedural and that Weeks has procedurally defaulted any objection to the trial court's response to the jury's question about its sentencing options.

We disagree with the Commonwealth's characterization. First, in the sentence at the end of the same paragraph that states that Weeks "effectively presents no argument in support of," *inter alia*, assignment of error no. 44, the Supreme Court of Virginia concluded, "We have considered these so-called arguments and *find no merit* in any of [them]." *Id.* (emphasis added). Second, the Supreme Court of Virginia stated the following near the end of its opinion: "[D]efendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. We have considered all the arguments in support of these issues and conclude that *none has any merit*." *Id.* at 390 (emphasis added). Because Weeks's jury made two inquiries and Weeks's brief to the Supreme Court of Virginia made two assignments of error (nos. 43 and 44) regarding the court's response to jury instructions, the Supreme Court of Virginia's use of the term "inquiries," must have referred to both assigned errors nos. 43 and 44. The Supreme Court of Virginia therefore adjudicated assigned error no. 44 on the merits, allowing us to review this claim in a federal habeas proceeding.[4] *See Wright v.*

---

[4] The district court also concluded that the Supreme Court of Virginia dismissed this claim on the merits. *See Weeks v. Angelone*, 4 F.Supp.2d 497, 536 (E.D.Va.1998).

Angelone, 151 F.3d 151, 156-57 (4th Cir.1998) (holding that a perfunctory decision constitutes an adjudication on the merits).

Where, as here, the state supreme court has adjudicated a claim on the merits but has given no indication of how it reached its decision, a federal habeas court must still apply the AEDPA standards of review. *See id.* A state court's perfunctory decision is reasonable if it " 'is at least minimally consistent with the facts and circumstances of the case.' " *Id.* at 157 (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 72, 139 L.Ed.2d 32 (1997)). Therefore, the writ will not issue unless we determine that the Supreme Court of Virginia's disposition of this claim was either contrary to federal law as determined by the Supreme Court or an application or interpretation of Supreme Court precedent "that reasonable jurists would all agree," *Green v. French*, 143 F.3d 865, 870 (4th Cir.1998), was not " 'minimally consistent with the facts and circumstances of the case,' " *Wright*, 151 F.3d at 157 (quoting *Hennon*, 109 F.3d at 335).

B.

The Eighth Amendment requires that a capital jury be able to consider and give effect to all relevant mitigating evidence offered by the petitioner. *See Eddings v. Oklahoma*, 455 U.S. 104, 112-14, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Evidence about the petitioner's background and character is necessary for the sentencer "to make an individualized assessment of the appropriateness of the death penalty." *Penry v. Lynaugh*, 492 U.S. 302,

319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In determining the validity of a challenged instruction, the instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). In *Boyde*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316, the Supreme Court fleshed out these principles, holding that the proper inquiry in cases where a capital sentencing instruction allegedly prevents the consideration of mitigating evidence is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380. Applying this rule to the petitioner's case in *Boyde*, the Supreme Court concluded that there was not a reasonable likelihood that the challenged instruction prevented the consideration of mitigating evidence, in light of the fact that the instruction told the jury that "you shall" consider "[a]ny other circumstance which extenuates the gravity of the crime" and that the jury was presented with four days of evidence at the penalty phase relating to Boyde's background and character. *Id.* at 381; *see id.* at 381-84.

Applying the *Boyde* inquiry in *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998), the Supreme Court upheld the constitutionality of the Virginia pattern capital sentencing instruction, the very instruction at issue in this case, against a challenge on Eighth and Fourteenth Amendment grounds. The Supreme Court first noted that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. However, the State may shape and structure the jury's

consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan*, 118 S.Ct. at 761 (internal citations omitted). The Court further held, in pertinent part:

> The instruction did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on "all the evidence," the instruction afforded jurors an opportunity to consider mitigating evidence. The instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they "may fix" the penalty at death, but directed that if they believed that all the evidence justified a lesser sentence then they "shall" impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved.

Id. at 762. The Supreme Court concluded that "[e]ven were we to entertain some doubt as to the clarity of the instructions," the two days of testimony related to mitigating evidence and the extensive arguments of the defense and the prosecution on the effect such evidence should be given in the sentencing determination demonstrated that there was "not a reasonable likelihood" that the instructions had precluded the jury's consideration of Buchanan's mitigating evidence in violation of *Boyde*. *Id.* at 762-63.

Given the Supreme Court's decision in *Buchanan*, Weeks is reduced to arguing that the trial court's failure to clarify a constitutionally sufficient instruction violated his Eighth and Fourteenth Amendment rights because the jury's question placed the trial court on notice that it was

reasonably likely that the jury would apply the instruction in a way that prevented the consideration of mitigating evidence. We find this argument to be without merit. Following the jury's finding of guilt on the capital murder charge, Weeks presented mitigating evidence as to his religious upbringing, the abrupt manner in which the events surrounding the shooting unfolded, and his feelings of remorse. Defense counsel argued extensively that the jury should give this mitigating evidence great weight in the sentencing determination. "[W]e think it unlikely that reasonable jurors would believe the court's instructions transformed all of this favorable testimony into a virtual charade." *Boyde*, 494 U.S. at 383 (internal quotation marks omitted). In fact, the verdict form the jury returned specifically noted that in fixing Weeks's punishment at death, the jury "considered the evidence in mitigation of the offense." (J.A. at 258, 1345-46.) At the conclusion of the penalty phase, following the announcement of the verdict in open court, each member of the jury was polled and confirmed the verdict.

Under these circumstances, we believe that no reasonable juror would have understood the sentencing instruction to preclude the consideration of mitigating evidence even upon a finding of an aggravating factor. The Supreme Court of Virginia's summary disposition of this claim, therefore, was neither contrary to federal law as interpreted by the Supreme Court of the United States nor an application or interpretation of *Boyde* "that reasonable jurists would all agree," *Green*, 143 F.3d at 870, was

not "minimally consistent with the facts and circumstances of the case," *Wright*, 151 F.3d at 157.[5]

IV.

Next, Weeks argues that the trial court's denial of his request for appointed ballistics and pathology experts violated his rights under the Fourteenth Amendment.[6] As support for his argument, Weeks cites the Supreme Court of Virginia's opinion in *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (Va.1996), *cert. denied*, 519 U.S. 1154, 117 S.Ct. 1092, 137 L.Ed.2d 225 (1997), decided one year after Weeks's conviction became final. In *Husske*, the Supreme Court of Virginia held that in certain instances, indigent defendants must be provided with non-psychiatric experts as part of the "basic tools of an adequate defense." *Id.* at 925.

A.

Prior to the trial, Weeks filed a motion for expert assistance in the fields of ballistics and pathology and, simultaneously, asked that his motion be treated pursuant

---

[5] Even if we were to apply the pre-AEDPA standard of de novo review, *see Howard v. Moore*, 131 F.3d 399, 406 (4th Cir.1997) (en banc), *cert. denied*, ___ U.S. ___, 119 S.Ct. 108, 142 L.Ed.2d 86 (1998), we would conclude, for the reasons discussed, that the trial court's actions did not prevent the jury's consideration of mitigating evidence in violation of *Boyde*.

[6] Because Weeks frames this issue in his brief in terms of the fairness of the trial he received, we utilize a due process analysis in addressing his claim. *See Moore v. Kemp*, 809 F.2d 702, 709 n. 6 (11th Cir.1987) (en banc).

to 18 U.S.C.A. § 3006A(e) (West Supp.1998), which requires that an indigent's request for expert assistance in federal court be treated ex parte. Weeks contended that expert assistance was needed to evaluate the evidence and present a defense on the issues of premeditation in the guilt phase and vileness in the sentencing phase. Weeks contended that because he must demonstrate to the court why such expert assistance is required, the hearing on the motion should be ex parte to prevent the prosecution from learning the theory of the defense. After hearing argument of counsel, the trial court entered an order of September 28, 1993, denying both the motion and Weeks's request for an ex parte hearing on the motion.

On direct appeal, Weeks raised numerous assignments of error. In his 11th assignment of error, Weeks argued that the trial court erred by denying his application to be heard ex parte on his motion for expert assistance in the fields of pathology and ballistics. In his 12th assignment of error, Weeks argued that the trial court erred by denying his motion for expert assistance in the field of pathology and ballistics. The Supreme Court of Virginia declined to grant relief on either claim. *See Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 388 (Va.1994).

The Commonwealth argues that the Supreme Court of Virginia's disposition of Weeks's 12th assignment of error, *i.e.*, his claim for appointment of experts, is not cognizable on federal habeas because it "reached no federal constitutional issue, for the simple reason that Weeks advanced no such claim." (Appellee's Br. at 16-17.) A federal court may grant habeas relief "only on the ground

that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a) (West 1994). Therefore, when a petitioner's claim rests solely upon an interpretation of state case law and statutes, it is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Moreover, a federal habeas court cannot hear a petitioner's federal claims unless he has first exhausted state remedies, *see* 28 U.S.C.A. § 2254(b), (c) (West 1994 & Supp.1998), which requires that the petitioner fairly present the substance of his federal claim to the state courts, *see Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (per curiam) (reversing grant of writ of habeas corpus where petitioner, on direct appeal in state court, claimed that evidentiary ruling violated state law but did not claim violation of any federal constitutional right).

Applying these principles to the facts of this case, we find the Commonwealth's argument unpersuasive. Although the Commonwealth correctly noted that the Supreme Court of Virginia did not discuss a federal constitutional issue in addressing Weeks's claim, it is the petitioner's argument to the court rather than the court's decision that is dispositive. Weeks's brief on direct appeal clearly alleged that the denial of expert assistance constituted violations of the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States. Because Weeks presented the substance of a federal constitutional claim for experts to the Supreme Court of

Virginia, we may review this claim in a federal habeas proceeding.

B.

Weeks argues that the Supreme Court of Virginia never adjudicated the merits of his claim, and, therefore, this Court must review it de novo. Specifically, Weeks alleges that the Supreme Court of Virginia dismissed his application for an ex parte hearing on his motion for expert assistance in the fields of pathology and ballistics, the 11th assignment of error, without addressing his actual request for such expert assistance, the 12th assignment of error. With regard to these two assignments of error, the Supreme Court of Virginia found the following:

> Associated with defendant's claim of error relating to the request for a scientific investigation is the complaint that the trial court erred by denying his request to be heard ex parte on his motion for expert assistance in the fields of pathology and ballistics, and for denial of the request for appointment of such experts. Defendant asked that his motion for funding for expert assistance "be treated under the same procedure as required by Title 18 USC 3006A(e) in Federal Court." There is no merit to this contention.
>
> We already have decided that a defendant charged with capital murder is not entitled to an ex parte hearing on his motion for expert assistance. *Ramdass v. Commonwealth*, 246 Va. 413, 422, 437 S.E.2d 566, 571 (1993), *rev'd on other grounds sub nom. Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). In

> addition, we specifically have refused to apply the federal statute to state capital murder prosecutions.

Weeks, 450 S.E.2d at 388. Weeks's claim rests on the arguable point that when the Supreme Court of Virginia stated that "[t]here is no merit to this contention," the singular term "this contention" only referred to Weeks's application for an ex parte hearing and not to his claim for experts. Weeks's interpretation is supported by the preceding sentence, in which the Supreme Court of Virginia ruled that Weeks asked that his request for an ex parte hearing be treated under the same procedure as required by 18 U.S.C.A. § 3006A(e). Weeks's argument is also supported by the subsequent paragraph, in which the Supreme Court of Virginia exclusively discussed Weeks's application to be heard ex parte on his motion for expert assistance. The fact that the state court did not address a petitioner's federal constitutional claim does not render his claim unreviewable on federal habeas if he demonstrates that the state court had a fair opportunity to address the claim. *Cf. Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997) (holding that a federal claim in a state court judgment on which the state court was silent will not be reviewed unless it was properly presented to the state court).

We agree with Weeks and conclude that the Supreme Court of Virginia failed to address his request for expert assistance in the fields of pathology and ballistics on the merits. Thus, we do not apply the standards of review set forth in 28 U.S.C.A. § 2254(d) (West Supp.1998), which requires that a claim be "adjudicated on the merits in State court proceedings." Because Weeks's request for

experts requires us to apply a legal standard to a given set of facts, we review his claim de novo.

C.

Even though Weeks's claim for expert assistance is not subject to 28 U.S.C.A. § 2254(d), we still must determine whether resolving Weeks's claim for experts in his favor would require this Court to announce a new rule in violation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). *See Green v. French*, 143 F.3d 865, 874 (4th Cir.1998) (holding that anti-retroactivity principles of *Teague* apply where limitations of § 2254(d)(1) do not). "Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions."[7] *Penry v. Lynaugh*, 492 U.S. 302, 313, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In general, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. "The principle announced in *Teague* serves to insure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S.Ct.

---

[7] The two exceptions are new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," and "watershed rules of criminal procedure" that significantly improve the accuracy of the factfinding procedure and implicate the fundamental fairness of the trial. *See Teague v. Lane*, 489 U.S. 288, 311-12, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion).

2822, 111 L.Ed.2d 193 (1990). Thus, a petitioner cannot receive federal habeas relief "unless reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to rule in his favor." *Graham v. Collins*, 506 U.S. 461, 467, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (internal quotation marks omitted).

In determining whether a petitioner seeks a new rule on collateral review, a court should proceed in three steps:

> First, the date on which the defendant's conviction became final is determined. Next, the habeas court considers whether "a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by the existing precedent to conclude that the rule [he] seeks was required by the Constitution." If not, then the rule is new. If the rule is determined to be new, the final step in the *Teague* analysis requires the court to determine whether the rule nonetheless falls within one of the two narrow exceptions to the *Teague* doctrine.

O'Dell v. Netherland, 521 U.S. 151, 117 S.Ct. 1969, 1973, 138 L.Ed.2d 351 (1997) (internal citations omitted). Weeks's conviction became final on October 2, 1995, the date the Supreme Court of the United States denied certiorari. We therefore must determine whether as of October 2, 1995, a Virginia state court would have been compelled by existing precedent to conclude that a rule establishing a right to appointment of experts in pathology and ballistics for indigent criminal defendants was required by the Constitution.

Supreme Court precedent establishes the principle that the government, upon request, must provide indigent defendants with the "basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971); *see Douglas v. California*, 372 U.S. 353, 357-58, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Griffin v. Illinois*, 351 U.S. 12, 18-19, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (plurality opinion). Although the government need not purchase for the indigent defendant all the assistance that a wealthier defendant might buy, fundamental fairness requires that indigent defendants have "an adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).[8] In *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court held that as part of the basic tools of an adequate defense, an indigent defendant has a due process right to the appointment of a psychiatrist to assist him in his defense when he "demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." *Id.* at 83. Although there was broad language in *Ake* suggesting application to a variety of circumstances in which an indigent defendant requests expert assistance, its precise holding was limited to the facts at hand. *See id.* at 83. In fact, the Supreme

---

[8] Although most of the early Supreme Court decisions in the area of the treatment of indigents in the criminal justice system rested on an equal protection framework, "[d]ue process and equal protection principles converge in the Court's analysis in these cases." *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

Court soon thereafter declined to extend *Ake*'s holding to the appointment of a criminal investigator, fingerprint expert, and ballistics expert and declined to address the question of "what *if any* showing would [entitle] a defendant to [private non-psychiatric] assistance" as a matter of federal constitutional law. *Caldwell v. Mississippi*, 472 U.S. 320, 323 n. 1, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (emphasis added).

We interpret *Ake* and *Caldwell* together to stand for the proposition that due process as of the time Weeks's conviction became final only required that an indigent defendant be appointed psychiatric experts when his sanity is at issue in the trial. Finding in favor of Weeks on his claim therefore would require us to announce a "new rule" of constitutional law in violation of *Teague*. Weeks cites *Husske*, 252 Va. 203, 476 S.E.2d 920, as support for his contention that he is not seeking the announcement of a new rule, but rather the application of an old rule. In *Husske*, the Supreme Court of Virginia noted the following:

> Our research reveals that most courts which have considered the question whether an indigent defendant is entitled to the appointment of a non-psychiatric expert have applied the rationale in *Ake*, and, those courts have held that the Due Process and Equal Protection clauses require the appointment of non-psychiatric experts to indigent defendants depending upon whether the defendants made a particularized showing of the need for the assistance of such experts.

Id. at 925 (citing numerous cases from state and federal courts). The Supreme Court of Virginia continued, "We

are of the opinion that *Ake* and *Caldwell*, when read together, require that the Commonwealth of Virginia, upon request, provide indigent defendants with 'the basic tools of an adequate defense,' and, that in certain instances, these basic tools may include the appointment of non-psychiatric experts." *Id.* (internal citation omitted). The Supreme Court of Virginia then held that an indigent defendant may establish an entitlement to appointment of a non-psychiatric expert "by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial." *Id.*

Weeks argues that although the *Husske* decision came out one year after his conviction became final, it provides a good proxy of what the Supreme Court of Virginia would have concluded had it addressed the issue in Weeks's case, and, therefore, application of the *Husske* rule to his case would not involve the application of a "new rule." *See Lambrix v. Singletary*, 520 U.S. 518, 117 S.Ct. 1517, 1529, 137 L.Ed.2d 771 (1997) (holding that case was a "particularly good proxy" for what a reasonable jurist would have thought four years previously, given that the only relevant cases decided in interim were dictated by precedent). We find Weeks's argument to be unpersuasive. The proper inquiry under *Teague* is whether the Supreme Court of Virginia would have been *compelled* by existing precedent at the time that Weeks's conviction became final to hold that Weeks was constitutionally entitled to the appointment of experts in pathology and ballistics, not whether the Supreme Court of Virginia would later be convinced after canvassing cases from other courts that such experts may be required in

certain instances. Weeks points to no controlling precedent between *Ake/Caldwell* and *Husske* that would compel the Supreme Court of Virginia to rule in his favor. Neither the mere fact that prior cases lent general support to the conclusion reached in *Husske*, nor Weeks's contention that the Supreme Court of Virginia would have felt compelled (by existing precedent at the time that Weeks's conviction became final) to conclude that the rule he seeks was required by the Constitution, suffices to show that *Husske* was not a new rule. *See Sawyer*, 497 U.S. at 236.

In fact, we have recently indicated that the *Husske* rule is not required by *Ake* and *Caldwell*. In *Gray v. Thompson*, 58 F.3d 59 (4th Cir.1995), this Court considered a habeas petitioner's claim that the Virginia state court's refusal to appoint a private investigator for the defense violated due process. *See id.* at 66. Citing *Caldwell*, we noted that the Supreme Court had flatly declined to resolve the question of what, if any, showing would entitle an indigent defendant to private non-psychiatric assistance as a matter of federal constitutional law. *See id.* We then concluded that resolving that question "would clearly be breaking new constitutional ground." *Id.* at 66; *see also Jackson v. Ylst*, 921 F.2d 882, 885-86 (9th Cir.1990) (declining to address same question). We see no reason why the holding in *Gray* does not apply to a claim based on a denial of experts in pathology and ballistics. Weeks therefore is requesting this Court to apply the new rule established by *Husske* to this case.

D.

Because Weeks claims the benefit of a new rule, the rule is not applicable to his case unless it falls within one of two narrow exceptions enunciated in *Teague*. Weeks argues that even if *Husske* was a new rule, his request falls under the second exception, which allows retroactive application of a "watershed rule of criminal procedure" that significantly improves the fact finding procedures and implicates the fundamental fairness of the trial. *See Teague*, 489 U.S. at 311. Weeks contends that in light of *Ake* and *Caldwell* it would be fundamentally unfair to conclude that psychiatrists are a basic tool of an adequate defense while non-psychiatric experts are not. In support of his argument, Weeks cites numerous cases in which this Court and others have recognized that due process may entitle an indigent defendant to receive the services of court-appointed independent non-psychiatric experts on request.

We find Weeks's argument to be unpersuasive. Because the second *Teague* exception is directed toward the accurate determination of guilt or innocence, it is "unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313. This Court has recognized that an indigent defendant has a right under the due process clause to the assistance of an expert if a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance. *See Williams v. Martin*, 618 F.2d 1021, 1027 (4th Cir.1980). *Williams* concerned the refusal of the trial court to furnish the defendant with an independent pathologist to serve as an expert witness concerning

the cause of the victim's death. *See id.* at 1026. Because there is no doubt as to the cause of Trooper Cavazos's death, we believe that Weeks's claim does not present the "substantial issue" necessary to invoke the *Williams* rule. *See George v. Angelone*, 901 F.Supp. 1070, 1084-85 & n. 8 (E.D.Va.1995) (following *Gray* and holding that petitioner is not entitled as a matter of due process to private investigator to assist defense in countering Government's "vileness" case at sentencing phase). Moreover, because the *Husske* rule recognizing a federal constitutional right to non-psychiatric experts in Virginia state cases upon a particularized showing of such need adds to an existing guarantee of due process, it is not an "absolute prerequisite to fundamental fairness" of the type required by *Teague*'s second exception. *Sawyer*, 497 U.S. at 244.

In sum, we hold that although Weeks's claim for experts in pathology and ballistics was not adjudicated by the state courts, finding a federal constitutional right to such experts upon a particularized showing of need would require us to apply a "new rule" in violation of *Teague*.[9]

---

[9] The relevant standard of review under the AEDPA is even more stringent than *Teague*, because under the AEDPA, a writ will not issue unless a state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States.*" 28 U.S.C.A. § 2254(d) (West Supp.1998) (emphasis added). It necessarily follows that if a decision resolving this claim in Weeks's favor is impermissible under *Teague*, such a decision is also impermissible under § 2254(d).

V.

Weeks also argues that the trial court violated his Fifth Amendment right against self-incrimination by refusing to suppress the confession he made to Agent Rowland at the second interrogation. Specifically, Weeks alleges that Agent Rowland's second interrogation failed to "scrupulously honor" Weeks's right to cut off questioning in violation of *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Furthermore, Weeks claims that the constitutional error of introducing his statements made at the second interrogation had a "substantial and injurious effect or influence in determining the jury's verdict." (Appellant's Br. at 24-25.)

The relevant circumstances surrounding Weeks's confession are as follows. At 7:40 a.m. on February 24, 1993, Weeks was read his *Miranda* rights by Agent Rowland, who had become suspicious of him during their conversation. Weeks invoked his right to remain silent and questioning immediately ceased. Upon learning several minutes later that the driver of the car in which Weeks was traveling had identified Weeks as the shooter of Trooper Cavazos, Rowland placed Weeks under arrest. Weeks was then taken before a magistrate and then to the Adult Classification Center in Manassas. Later that morning, in response to routine questions about his physical and mental state from classification officers in the jail, Weeks indicated that he was considering suicide because he had shot the trooper. At approximately 6:00 p.m., Weeks was brought to the lounge of the local prosecutor's office where Rowland again interviewed him. Rowland asked Weeks whether he remembered the rights Rowland had read to him earlier in the day and Weeks answered

affirmatively. Rowland proceeded to summarize the evidence against Weeks. At the end of his summary, Rowland told Weeks, "This is your opportunity to provide your explanation as to what happened at the shooting scene." *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379, 385 (1994). Weeks replied that he was "packing" a firearm and then confessed to Trooper Cavazos's murder.

In *Mosley*, the Supreme Court addressed an issue left open by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) – the circumstances, if any, under which resumption of questioning is permissible after a person in custody has indicated that he wishes to remain silent. *See Mosley*, 423 U.S. at 100-02. Rejecting an interpretation of *Miranda* that would "create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent," *id.* at 102-03, the Supreme Court concluded "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored,' " *id.* at 104. The Supreme Court set forth the following list of factors for a court to consider in making this inquiry: (1) whether the police had given the suspect *Miranda* warnings at the first interrogation and the suspect acknowledged that he understood the warnings; (2) whether the police immediately ceased the interrogation when the suspect indicated that he did not want to answer questions; (3) whether the police resumed questioning the suspect only after the passage of a significant period of time; (4) whether the police provided a

fresh set of *Miranda* warnings before the second interrogation; and (5) whether the second interrogation was restricted to a crime that had not been a subject of the earlier interrogation. *See id.* at 104-07.

Weeks argues that his second interrogation was in violation of *Mosley* because his interrogators violated three of the *Mosley* factors: a significant amount of time had not passed between interrogations, no new *Miranda* warnings were given, and the second interrogation concerned the same crime that was the subject of the first interrogation. Insofar as Weeks suggests that the failure to satisfy certain factors is dispositive of whether a *Mosley* violation has occurred, we disagree. *Mosley* does not prescribe a bright-line test to determine whether a suspect's right to cut off questioning was "scrupulously honored." Instead, the touchstone is whether a "review of the circumstances" leading up to the suspect's confession reveals that his "right to cut off questioning was fully respected." *Mosley*, 423 U.S. at 104; *see also United States v. Schwensow*, 151 F.3d 650, 659 (7th Cir.1998); *United States v. Alvarado-Saldivar*, 62 F.3d 697, 699 (5th Cir.1995).

Applying the *Mosley* factors to Weeks's case, we cannot conclude that the Supreme Court of Virginia's decision to uphold the trial court's admission of Weeks's confession was contrary to or an unreasonable application of *Mosley*. The first factor in the *Mosley* analysis is whether the suspect was advised before the initial interrogation that he had the right to remain silent. The second factor is whether there was an immediate stoppage of questioning once the suspect asserted his right to remain silent. In this case, it is undisputed that Weeks

received full *Miranda* warnings during his first interrogation by Agent Rowland and that questioning ceased immediately once Weeks invoked his right to cut off questioning.

The third factor in the *Mosley* analysis is whether the police waited a significant period of time after the suspect's initial invocation of his right to remain silent before questioning the suspect again. A significant period of time between interrogations does not require a durational minimum. *Compare United States v. Cody*, 114 F.3d 772, 775-76 (8th Cir.1997) (holding that three hours was significant amount of time) *with United States v. Barone*, 968 F.2d 1378, 1385 (1st Cir.1992) (holding that more than twenty-four hours was insufficient where police repeatedly pressured suspect to cooperate). Instead, a "significant period of time" is a function of to what degree the police "persist[ed] in repeated efforts to wear down [the suspect's] resistance and make him change his mind." *Mosley*, 423 U.S. at 105-06. In this case, over ten hours passed between the time when Weeks invoked his right to cut off questioning and the second interrogation, during which time Weeks was asked routine questions about his physical and mental state but was not subjected to repeated efforts to wear down his resistance. It was reasonable for the Supreme Court of Virginia to conclude that this period of time was sufficient. *See Mosley*, 423 U.S. at 104-06 (considering two hours to be a "significant period of time").

The fourth factor in the *Mosley* analysis is whether the suspect received a fresh set of *Miranda* warnings prior to the second interrogation. In this case, Agent Rowland admittedly did not reinform Weeks of his right to remain

silent prior to the second interrogation. Agent Rowland did, however, ask Weeks whether he remembered the rights he had been read from the first interrogation, and Weeks responded that he did. Weeks then proceeded to confess voluntarily to the trooper's murder. The fact that incomplete *Miranda* warnings, or no warnings at all, are given prior to the second interrogation is not decisive. *See, e.g., United States v. Andrade*, 135 F.3d 104, 106-07 (1st Cir.1998) (finding no *Mosley* violation where officer asked suspect whether he remembered rights that were read to him earlier and suspect answered in affirmative); *Kelly v. Lynaugh*, 862 F.2d 1126, 1131 (5th Cir.1988) (finding that failure to give new *Miranda* warnings did not establish *Mosley* violation because in light of two oral warnings and one written warning given earlier, it would be difficult to conclude that suspect had forgotten his *Miranda* rights); *Stumes v. Solem*, 752 F.2d 317, 319-22 (8th Cir.1985) (finding that failure to give new *Miranda* warnings did not establish *Mosley* violation because suspect's conduct indicated that he was aware of his *Miranda* rights). This principle is particularly apt here, as Weeks apparently was aware of his *Miranda* rights and voluntarily chose not to exercise them. *See Andrade*, 135 F.3d at 106-07; *Stumes*, 752 F.2d at 321. The fact that Weeks spoke to an officer to whom he had previously asserted his right to cut off questioning further indicates that he was comfortable in exercising this right and that his decision not to exercise this right was the product of volition rather than of coercion.

The fifth factor in the *Mosley* analysis is whether the second interrogation concerned a crime that was the subject of the first interrogation. In this case, both interrogations concerned the same crime – the murder of Trooper Cavazos. Where other factors indicate that a defendant's right to cut off questioning was "scrupulously honored," however, the mere fact that a second interrogation involves the same crime as the first interrogation does not necessarily render a confession derived from the second interrogation unconstitutionally invalid under *Mosley*. *See, e.g., Schwensow,* 151 F.3d at 659 ("[T]he constitutionality of a subsequent police interview depends not on its subject matter but rather on whether the police, in conducting the interview, sought to undermine the suspect's resolve to remain silent."); *Hatley v. Lockhart,* 990 F.2d 1070, 1074 (8th Cir.1993) ("[A] second interrogation is not rendered unconstitutional simply because it involves the same subject matter discussed during the first interview."); *United States v. Hsu,* 852 F.2d 407, 410 (9th Cir.1988) (noting that under flexible *Mosley* approach, "an identity of subject matter in the first and second interrogations is not sufficient, in and of itself, to render the second interrogation unconstitutional").

In sum, under the totality of the circumstances, it was reasonable for the Supreme Court of Virginia to conclude that the police "scrupulously honored" Weeks's right to cut off questioning. The record before us clearly demonstrates that the Supreme Court of Virginia's decision upholding the trial court's admission of Weeks's confession derived from the second interrogation was neither contrary to *Mosley* nor an application or interpretation of *Mosley* "that reasonable jurists would all agree [wa]s

unreasonable." *Green v. French,* 143 F.3d 865, 870 (4th Cir.1998).[10]

VI.

Next, Weeks argues that the district court erred in holding that several of his claims were procedurally defaulted. Under the well-established doctrine of procedural default, a federal habeas court may not review a claim that a state court has found to be clearly and expressly defaulted under an independent and adequate state procedural rule unless the prisoner can demonstrate cause for the default and prejudice resulting therefrom or demonstrate that a failure to consider the claims will result in a fundamental miscarriage of justice.[11] *See*

---

[10] Even if we were to apply the pre-AEDPA standard of de novo review, *see Howard v. Moore,* 131 F.3d 399, 406 (4th Cir.1997) (en banc), *cert. denied,* ___ U.S. ___, 119 S.Ct. 108, 142 L.Ed.2d 86 (1998), we would conclude, for the reasons discussed, that Weeks has failed to show that the police did not "scrupulously honor" his right to cut off questioning under *Mosley*.

[11] Under the "miscarriage of justice" doctrine, a writ may be granted even without a showing of cause if a constitutional violation has probably resulted in the conviction of someone who is actually innocent. *See Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397(1986). In a capital case, to show "actual innocence" of the death penalty, a petitioner must show by clear and convincing evidence that but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty. *See Sawyer v. Whitley,* 505 U.S. 333, 348, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Before this Court, Weeks has not argued that our refusal to address his procedurally defaulted claims would result in a "miscarriage of justice." Accordingly, we do not address the "miscarriage of justice" exception.

Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Harris v. Reed*, 489 U.S. 255, 262, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). A state rule is adequate if it is "firmly established," *James v. Kentucky*, 466 U.S. 341, 348, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984), and regularly and consistently applied by the state court, *see Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), and is independent if it does not "depend[ ] on a federal constitutional ruling," *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

A.

First, Weeks asserts that the district court erred when it determined that Claims IV and XXIV were procedurally defaulted. On direct appeal, the Supreme Court of Virginia ruled that it would not address Weeks's assignment of errors 10 and 36 because Weeks failed to register these objections at trial as required by Rule 5:25 of the Rules of the Supreme Court of Virginia.[12] *Weeks v. Commonwealth*, 450 S.E.2d 379, 388, 389 (Va.1994). Weeks subsequently raised these objections in his federal habeas petition as Claims IV and XXIV. The district court found these claims to be procedurally defaulted under Rule 5:25. *Weeks v. Angelone*, 4 F.Supp.2d 497, 515 (E.D.Va.1998).

---

[12] Rule 5:25 provides: "Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Va. Sup.Ct. R. 5:25 (Michie 1998).

Weeks does not dispute that these claims are procedurally defaulted under Rule 5:25, but he now argues that Rule 5:25 is not an adequate state procedural bar because it is not regularly and consistently applied by the Virginia state courts. As support for this contention, Weeks cites several Virginia state cases that allegedly demonstrate that Virginia courts have often strayed from the contemporaneous objection rule.

We find this argument to be without merit. As a general matter, an unambiguous court rule such as Rule 5:25 is necessarily "firmly established." *See O'Dell v. Netherland*, 95 F.3d 1214, 1241 (4th Cir.1996) (en banc). Moreover, contrary to Weeks's assertion on appeal, the Supreme Court of Virginia has regularly and consistently applied Rule 5:25 in recent years. *See, e.g., Fairfax Hosp. v. Curtis*, 492 S.E.2d 642, 648 (Va.1997); *Angstadt v. Atlantic Mut. Ins. Co.*, 492 S.E.2d 118, 121 (Va.1997); *Hughes v. Cole*, 251 Va. 3, 465 S.E.2d 820, 831 (Va.1996); *see also Bennett v. Angelone*, 92 F.3d 1336, 1345 n. 7 (4th Cir.1996) ("Normally, the Virginia Supreme Court will not review errors not preserved by contemporaneous objection."). The mere recitation of a few cases in which the Supreme Court of Virginia has not applied Rule 5:25 is insufficient to show that Rule 5:25 is not consistently or regularly applied because "[c]onsistent or regular application of a state rule of procedural default does not require that the state court show an undeviating adherence to such rule admitting of *no* exception, when the state procedural rule has, as a general rule, . . . been applied in the vast majority of cases." *Yeatts v. Angelone*, 166 F.3d 255, 263-64 (4th Cir.1999) (internal quotation marks and citations omitted); *accord Smith v. Dixon*, 14 F.3d 956, 972 (4th Cir.1994).

Weeks therefore fails to establish that Rule 5:25 is not an independent and adequate state procedural bar precluding review of errors he did not raise at trial.

B.

Next, Weeks claims that the district court erred when it determined that Claims II, III, VI, VIII, XVII, XXI, and XXIII were procedurally defaulted. On direct appeal, Weeks filed a ninety-page brief that raised forty-seven errors. He moved for leave to file an oversized brief pursuant to Rule 5:26. The Supreme Court of Virginia denied Weeks's motion and ordered him to file a fifty-page brief.[13] Due to the space limitation, Weeks deleted the arguments supporting ten claims of federal constitutional error. The Supreme Court of Virginia refused to consider these ten claims (nos. 4, 5, 6, 7, 8, 17, 26, 31, 38, and 39) for failure to brief or argue the errors. *Weeks*, 450 S.E.2d at 383 (citing *Jenkins v. Commonwealth*, 244 Va. 445, 423 S.E.2d 360, 364 (1992)). Weeks subsequently raised seven of these claims in his federal habeas petition as Claims II, III, VI, VIII, XVII, XXI, and XXIII. The district court found these claims to be procedurally defaulted for failure to brief them on direct appeal. *Weeks*, 4 F.Supp.2d at 515-17.

Weeks now argues that the state rule preventing consideration of claims not briefed on direct appeal does not

[13] Rule 5:26(a) provides: "Except by permission of a justice of this Court, neither the opening brief of appellant, nor the brief of appellee, nor a brief amicus curiae shall exceed 50 typed or 36 printed pages." Va.Sup.Ct. R. 5:26(a) (Michie 1998).

constitute an adequate and independent state bar because the fifty-page limitation physically prevented him from presenting these claims. In the alternative, Weeks argues that even if the rule is an adequate and independent state procedural bar, he has shown cause and prejudice to overcome the bar because the Supreme Court of Virginia's refusal to deviate from its fifty-page limit even when it was on notice that Weeks needed more than fifty pages to present his arguments was an "objective factor external to the defense" that impeded Weeks's ability to comply with the state procedural rule. Weeks also argues that by proffering the defaulted claims in his original oversized brief, he satisfied the exhaustion requirement for the purposes of federal proceedings and that further presentation of these claims was not required because the fifty-page limitation rendered the state appellate process ineffective to protect his rights. We address these arguments in turn.

1.

First, Weeks argues that the state procedural bar preventing consideration of claims not briefed on direct appeal was not adequate and independent because the fifty-page brief limit physically prevented him from presenting all forty-seven assigned errors to the Supreme Court of Virginia. In support of this argument, Weeks cites *Reese v. Peters*, 926 F.2d 668 (7th Cir.1991). In *Reese*, state law prevented the petitioner from raising several claims in post-conviction proceedings in state court. *See id.* at 670. On federal habeas review, the district court deemed these claims to be forfeited. *See id.* The Seventh Circuit stated that "[w]hen state law does not allow the

prisoner to present a particular claim, the omission – submitting to limitations established by law – is not an independent and adequate state ground precluding federal review." *Id.* The Seventh Circuit concluded, however, that because the petitioner did not present the claims on direct appeal from his conviction, he forfeited the claims on collateral review. *See id.* at 671.

Reese cuts against Weeks's argument rather than supporting it. Much like the petitioner in *Reese*, Weeks voluntarily withdrew the arguments supporting several claims on direct appeal. The fifty-page limit merely limited the manner in which Weeks could present his arguments; it did not wholly prevent him from presenting them. Moreover, the Supreme Court of Virginia has regularly and consistently refused to consider claims not briefed or argued on direct appeal. *See, e.g., Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380, 385 (1992); *Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218, 222 (1991); *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385, 390 (1990). The state procedural rule that deems arguments not briefed to be waived is therefore an adequate and independent state bar.

2.

Second, Weeks argues that even if the state procedural bar was adequate and independent, cause and prejudice existed for his default. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's effort to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S.

478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Weeks argues that the fifty-page limit imposed by the Supreme Court of Virginia was itself an "objective factor external to the defense" that impeded his effort to comply with the state procedural rule.

We find this argument unpersuasive. While the page limitation may have led Weeks's counsel to make certain strategic choices as to which arguments to include and which to omit, the page limitation is reasonable.[14] It would be nonsensical to hold that the fifty-page limit, which is itself a reasonable and consistently applied state procedural rule, could constitute cause for failure to adhere to another state procedural rule that deems issues not briefed on direct appeal to be waived. The fifty-page limit therefore did not constitute cause for Weeks's failure to comply with the state procedural rule requiring litigants to brief issues on appeal in order to preserve them.

3.

Finally, Weeks argues that by presenting the defaulted claims in his original oversized brief, he satisfied the exhaustion requirement for purposes of federal proceedings. Weeks also argues that further presentation of these claims was not required because circumstances existed that rendered the state appellate process ineffective to protect his rights. *See* 28 U.S.C.A. § 2254(b)(1)(B)(ii) (West Supp.1998). It appears that Weeks

---

[14] The United States Supreme Court limits opening briefs to 50 pages. *See* U.S. S.Ct. R. 33.1(g).

is conflating the related concepts of exhaustion and procedural default.[15] Both parties, the district court, and we agree that Weeks's claims have been exhausted. The issue, however, is whether these claims are defaulted by Weeks's failure to brief them on direct appeal, and, if so, whether there is cause for and prejudice resulting from Weeks's default. As we concluded above, the state rule preventing consideration of claims not briefed on direct appeal is an adequate and independent state bar, and the fifty-page limit does not constitute cause for defaulted claims not presented on appeal. Weeks therefore fails to show that the state procedural rule barring review of claims not briefed on appeal is not an adequate and independent state bar precluding review of the claims he chose not to present to the Supreme Court of Virginia in his fifty-page brief.

---

[15] "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997). "A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture." *George v. Angelone*, 100 F.3d 353, 363 (4th Cir.1996). Thus, the exhaustion requirement is also satisfied when a state procedural rule would bar consideration of the unexhausted claim if the claim was presented to the state court. *See Matthews*, 105 F.3d at 911 (citing *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). A claim is procedurally defaulted when it is rejected by a state court on an adequate and independent state procedural ground. *See Coleman*, 501 U.S. at 750.

C.

Finally, Weeks claims that the district court erred when it determined that his ineffective-assistance-of-trial-counsel claims were procedurally defaulted. As of July 1, 1995, prisoners under a sentence of death were required to comply with a statute of limitations for filing a habeas petition and were limited to filing an original petition in the Supreme Court of Virginia. *See* Va.Code Ann. § 8.01-654.1 (Michie Supp.1998); Va. Sup.Ct. R. 5:7A(a) (Michie 1998).[16] (J.A. at 517-20). Weeks's state habeas counsel erroneously filed Weeks's habeas petition in the Circuit Court for Prince William County. On December 1, 1995, the date on which Weeks's state habeas petition was due in the Supreme Court of Virginia, habeas counsel withdrew the petition and mailed it to the Supreme Court of Virginia by regular mail. The Supreme Court of Virginia received the petition on December 4, 1995.[17] On

---

[16] Section 8.01-654.1 provides: "No petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after . . . denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal." Va.Code. Ann. § 8.01-654.1 (Michie Supp.1998). Rule 5:7A(a) provides: "A petition for a writ of habeas corpus shall be filed in the office of the clerk of this Court within 60 days after . . . the denial by the Supreme Court of the United States of a petition for a writ of certiorari to the judgment of this Court on direct appeal." Va. Sup.Ct. R. 5:7A(a) (Michie 1998).

[17] Had Weeks's state habeas petition been mailed by registered or certified mail, rather than by ordinary mail, it would have been deemed timely. *See* Va. Sup.Ct. R. 5:5(b) (Michie 1998).

March 15, 1996, the Supreme Court of Virginia granted the Commonwealth's motion to dismiss Weeks's petition as untimely, and, therefore, jurisdictionally barred. The district court found Weeks's ineffective-assistance-of-trial-counsel claims to be procedurally defaulted due to the untimely filing of his state habeas petition. *Weeks*, 4 F.Supp.2d at 510-11.

In Virginia, claims of ineffective assistance of trial counsel generally must be presented on collateral review rather than direct appeal. *See Roach v. Commonwealth*, 251 Va. 324, 468 S.E.2d 98, 105 n. 4 (1996). Weeks does not dispute that the untimely filing of his state habeas petition constitutes an independent and adequate state bar to the consideration of his ineffective-assistance-of-trial-counsel claims on federal habeas, but he now argues that cause and prejudice exist to excuse his defaults. Specifically, Weeks alleges that the defaults resulted from the clear conflict of interest under which his court-appointed state habeas attorney labored: the attorney had previously represented at trial another capital defendant, who was subsequently represented on state habeas by Weeks's former trial attorney. As support for his contention that such a conflict constitutes "cause," Weeks cites Legal Ethics Opinion (LEO) No. 1665, issued on April 1, 1996, by the Virginia State Bar, which condemned such "cross appointments" because each counsel "was expected to zealously advocate petitioner's claims of ineffective assistance of counsel . . . while simultaneously defending himself against substantially similar claims."

Ineffective assistance of counsel may constitute "cause" for a procedural default under certain circumstances. *Murray*, 477 U.S. at 488. For an attorney error to

constitute cause, however, a petitioner must first possess a constitutional right to assistance of counsel. *See Coleman*, 501 U.S. at 752. This Court has recently held that a petitioner has no constitutional right to assistance of counsel in state habeas proceedings, even though claims of ineffective assistance of trial counsel can only be raised on state collateral review. *See Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir.1997) (en banc), *cert. denied*, ___ U.S. ___, 118 S.Ct. 907, 139 L.Ed.2d 922 (1998). In an attempt to avoid the binding precedent of *Mackall*, Weeks argues that he possesses a liberty interest in conflict-free habeas representation that is protected under the due process clause of the Fourteenth Amendment based on his statutory right to counsel under Va.Code Ann. § 19.2-163.7 (Michie 1995).[18] Weeks further contends that the actions of his conflicted state habeas counsel in failing to observe the jurisdictional rules in filing his state habeas petition and in failing to withdraw after the Virginia State Bar issued LEO No. 1665, and of the state courts in appointing conflicted counsel, constituted violations of his due process rights.

Although Weeks characterizes the conduct of his state habeas counsel as "outrageous," at the district court level he relied on the same set of facts in making his Sixth Amendment claim of ineffective assistance of habeas counsel as his Fourteenth Amendment due process claim.

---

[18] Section 19.2-163.7 of the Virginia Code provides that following the affirmance of a death sentence on appeal to the Supreme Court of Virginia, the circuit court shall appoint counsel to represent an indigent prisoner in a state habeas proceeding. *See* Va.Code Ann. § 19.2-163.7 (Michie 1995).

We thus view his argument as an attempt to shoehorn a claim of ineffective assistance of counsel into a due process claim. We agree with the Ninth Circuit's reasoning in *Bonin v. Calderon*, 77 F.3d 1155 (9th Cir.1996), which denied a due process claim nearly identical to Weeks's:

> [The petitioner] essentially argues that the Fourteenth Amendment violation is his ineffective assistance of counsel. . . . [W]e now hold that ineffective assistance of counsel in habeas corpus proceedings does not present an independent violation of the Sixth Amendment enforceable against the states through the Due Process Clause of the Fourteenth Amendment. To recognize such a claim would allow the Fourteenth Amendment to "swallow the rule" that there is no constitutional right to effective assistance of counsel in habeas corpus proceedings.

Id. at 1160; *see also Smith v. Angelone*, 111 F.3d 1126, 1133 n. 4 (4th Cir.1997) ("We have never held that a prisoner may claim a due process violation based upon his lawyer's performance on state habeas. . . . "), *cert. denied*, 521 U.S. 1131, 118 S.Ct. 2, 138 L.Ed.2d 1036 (1997). Under the persuasive reasoning of *Bonin*, a petitioner may claim a due process violation occurring in his state habeas proceeding, but he may not premise this claim solely on the alleged ineffective assistance of state habeas counsel. Because Weeks's due process claim is the same as his claim of ineffective assistance of habeas counsel and this Court does not recognize a constitutional right to counsel on state habeas, the alleged ineffective assistance of habeas counsel cannot constitute cause to excuse Weeks's defaulted ineffective-assistance-of-trial-counsel claims.

VII.

In conclusion, for the reasons discussed above, we hold that Weeks has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C.A. § 2253(c)(2) (West Supp.1998). We therefore deny his application for a certificate of appealability and dismiss his petition.

DISMISSED.

Supreme Court of the United States

***No.* 99-5746**

LONNIE WEEKS, JR.,

Petitioner

v.

RONALD J. ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

September 1, 1999

(9)

99-5746

Supreme Court, U.S.
FILED
NOV 15 1999
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD J. ANGELONE, Director,
Virginia Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT

MARK L. EARLEY
Attorney General of Virginia

ROBERT H. ANDERSON, III
Assistant Attorney General
Counsel of Record

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

558

QUESTIONS PRESENTED

1. Is Weeks' claim defaulted and barred from federal collateral review because he failed to "fairly present" it to the Virginia Supreme Court on direct appeal?

2. Is granting relief upon Weeks' claim – which challenges the adequacy of the trial court's discretionary, accurate response to the sentencing jury's question – barred by the "new rule" doctrine and 28 U.S.C. § 2254(d)?

3. Under all the relevant facts surrounding Weeks' penalty-stage proceeding, is there a reasonable likelihood that the jury could have believed it was precluded from considering his mitigation evidence?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Weeks' Murder of Trooper Cavazos 1

B. Trial Court Proceedings 3

C. Direct Appeal 15

D. State Collateral Proceedings 17

E. Federal Collateral Proceedings 17

SUMMARY OF ARGUMENT 19

ARGUMENT 21

I. WEEKS' CONSTITUTIONAL CLAIM IS DEFAULTED BECAUSE HE NEVER FAIRLY PRESENTED IT IN STATE COURT 21

II. WEEKS' CLAIM, IF ACCEPTED, WOULD CONSTITUTE AN IMPERMISSIBLE "NEW RULE," AND RELIEF LIKEWISE IS BARRED UNDER 28 U.S.C. § 2254(d) 26

III. THE TRIAL COURT PROPERLY ANSWERED THE JURY'S QUESTION ABOUT ITS SENTENCING ALTERNATIVES, AND THERE IS NO REASONABLE LIKELIHOOD THAT THE JURY BELIEVED IT WAS PRECLUDED FROM CONSIDERING THE MITIGATION EVIDENCE 37

CONCLUSION 48

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Harless, 459 U.S. 4 (1982) 22

Bollenbach v. United States, 362 U.S. 607 (1946) 34, 35, 36, 37, 45

Boyde v. California, 494 U.S. 370 (1990) ..... *passim*

Buchanan v. Angelone, 522 U.S. 269 (1998) ..... *passim*

Butler v. McKellar, 494 U.S. 407 (1990) 28, 29

Cage v. Louisiana, 498 U.S. 39 (1990) 38

Calderon v. Thompson, 118 S.Ct. 1489 (1998) 47

Caldwell v. Mississippi, 472 U.S. 320 (1985) 29, 35

Caspari v. Bohlen, 510 U.S. 383 (1994) 29

Davis v. Greer, 675 F.2d 141 (7th Cir.), *cert. denied*, 459 U.S. 975 (1982) 31

Duncan v. Henry, 513 U.S. 364 (1995) (*per curiam*) 22

Eddings v. Oklahoma, 455 U.S. 104 (1982) 35

Estelle v. McGuire, 502 U.S. 62 (1991) 32, 39

Franklin v. Lynaugh, 487 U.S. 164 (1988) 47

Gilmore v. Taylor, 508 U.S. 333 (1993) 29, 35

Goeke v. Branch, 514 U.S. 115 (1995) 29

Graham v. Collins, 506 U.S. 461 (1993) 28, 29, 35

Gray v. Netherland, 518 U.S. 152 (1996) 35

Johnson v. Texas, 509 U.S. 350 (1993) 47

Jones v. United States, 119 S.Ct. 2090 (1999) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Jurek v. Texas, 428 U.S. 262 (1976) 47

Lambrix v. Singletary, 520 U.S. 518 (1997) 29, 34, 36

Lockett v. Ohio, 438 U.S. 586 (1978) 35

Lockhart v. Fretwell, 506 U.S. 364 (1993) 34

McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997), *cert. denied*, 523 U.S. 1103 (1998) 32, 33

O'Dell v. Netherland, 521 U.S. 151 (1997) 28, 29

Penry v. Lynaugh, 492 U.S. 302 (1989) 15

Picard v. Connor, 404 U.S. 270 (1971) 22

Romano v. California, 512 U.S. 1 (1994) 27, 47

Saffle v. Parks, 494 U.S. 484 (1990) 28, 29, 35

Savino v. Commonwealth, 391 S.E.2d 276 (Va.), *cert. denied*, 498 U.S. 882 (1990) 25

Sawyer v. Smith, 497 U.S. 227 (1990) 29, 35

Smith v. Murray, 477 U.S. 527 (1986) 21

Stockton v. Commonwealth, 402 S.E.2d 196 (Va.), *cert. denied*, 502 U.S. 902 (1991) 25

Teague v. Lane, 489 U.S. 288 (1989) 20, 21, 28, 29

Trest v. Cain, 522 U.S. 87 (1997) 34

United States v. Atterson, 926 F.2d 649 (7th Cir. 1991) 31

United States v. Bailey, 830 F.2d 156 (11th Cir. 1987) 31

United States v. Barr, 963 F.2d 641 (3rd Cir. 1992) 45

TABLE OF AUTHORITIES – Continued

Page

United States v. Barrigan-Devis, 133 F.3d 1287 (9th Cir. 1998) 33

United States v. Barsanti, 943 F.2d 428 (8th Cir. 1992) 31

United States v. Beverly, 913 F.2d 337 (7th Cir. 1990) 30, 31

United States v. Bi-Co Pavers, Inc., 741 F.2d 730 (5th Cir. 1984) 45

United States v. Caro, 965 F.2d 1548 (10th Cir. 1992) 31, 38

United States v. Civilli, 883 F.2d 191 (2d Cir. 1989) 30

United States v. Cornillie, 92 F.3d 145 (8th Cir. 1997) 32

United States v. Dorri, 15 F.3d 888 (9th Cir.), *cert. denied*, 513 U.S. 1004 (1994) 30, 31, 35, 36

United States v. Ellis, 23 F.3d 1268 (7th Cir. 1994) 38

United States v. Gibbons, 968 F.2d 639 (8th Cir. 1992) 31

United States v. James, 998 F.2d 74 (2d Cir. 1993) 38

United States v. Keeper, 977 F.2d 1238 (8th Cir. 1992) 31

United States v. Kimmel, 777 F.2d 290 (5th Cir. 1985) 31

United States v. Ladd, 885 F.2d 954 (1st Cir. 1989) 30, 36

United States v. Laing, 889 F.2d 281 (D.C. Cir. 1989), *cert. denied sub nom., Martin v. United States*, 494 U.S. 1008 (1990) 30, 36

United States v. Mealy, 851 F.2d 890 (7th Cir. 1988) 31

United States v. Mejia, 82 F.3d 1032 (11th Cir. 1996) 32

TABLE OF AUTHORITIES – Continued

Page

United States v. Smith, 104 F.3d 145 (8th Cir. 1997) ..32, 38

United States v. Smith, 62 F.3d 641 (4th Cir. 1995), *appeal after remand*, 91 F.3d 136 (1996)..... 30

United States v. Span, 170 F.3d 798 (7th Cir. 1999) 32

United States v. Stowell, 947 F.2d 1251 (5th Cir. 1991).....30, 38, 46

United States v. Walther, 867 F.2d 1334 (11th Cir. 1989).....30, 31

United States v. White, 794 F.2d 367 (8th Cir. 1986) ..30, 31

Victor v. Nebraska, 511 U.S. 1 (1994) 38

Weeks v. Angelone, 4 F. Supp. 2d 497 (E.D. Va. 1998).....17, 46

Weeks v. Angelone, 176 F.3d 249 (4th Cir. 1999)..... 18

Weeks v. Commonwealth, 450 S.E.2d 379 (Va. 1994) 16

Weeks v. Virginia, 516 U.S. 829 (1995)..... 16

Yeatts v. Murray, 455 S.E.2d 18 (Va. 1995) 24

STATUTES AND RULES

Federal

28 U.S.C. § 2254(d) 17, 18, 20, 33, 34, 35

28 U.S.C. § 2254(d)(1).....34, 36

Supreme Court Rule 14.1(a)..... 34

Supreme Court Rule 24.1 24

Supreme Court Rule 24.1(f) 34

TABLE OF AUTHORITIES – Continued

Page

State

§ 8.01-654.1, Code of Virginia..... 17

§ 18.2-31(6), Code of Virginia..... 3

§ 19.2-264.4, Code of Virginia..... 12

§ 19.2-264.5, Code of Virginia..... 15

§ 53.1-232.1, Code of Virginia..... 18

Rule 5:7A(a), Rules of the Supreme Court of Virginia 17

Rule 5:17(c), Rules of the Supreme Court of Virginia 24

Rule 5:27, Rules of the Supreme Court of Virginia 24

STATEMENT OF THE CASE

A. Weeks' Murder of Trooper Cavazos

Shortly after 12:30 a.m. on February 24, 1993, Virginia State Trooper Jose Cavazos, who was operating a radar check at a cross-over on southbound Interstate 95 in Prince William County, observed a Volkswagen Jetta being driven at a high rate of speed. (App. 120-121, 273-274). Louis Dukes, Jr., was driving the vehicle, while Lonnie Weeks, Jr., sat in the front passenger seat. Cavazos then pursued Dukes' vehicle, which passed another car on the right shoulder. Finally, Cavazos stopped Dukes' automobile at the overpass on the Dale City exit ramp. (App. 274). As far as Cavazos knew, the traffic stop was a routine one. Unfortunately for the trooper, who had only a few minutes to live, the stop was anything but routine for Weeks.

Unbeknownst to Trooper Cavazos, Weeks was on probation in North Carolina for a 1992 drug conviction and had violated the terms of his probation, both by not informing his North Carolina probation officer that he was leaving for Washington, D.C., and by not obtaining her written permission. (App. 121; Oct. 21, 1993, Tr. 25-30). Additionally, the very car that Weeks was traveling in was one that he had stolen from Gene Farmer in Fayetteville, North Carolina, at the end of January, 1993. (App. 273; Oct. 19, 1993, Tr. 260-265). A man named George Mallett, moreover, had been murdered in Fayetteville on January 9, 1993. (App. 273-274; Oct. 20, 1993, Tr. 111-112). Although Weeks had not been involved in Mallett's murder, he had obtained in January, 1993 the Glock 17 pistol used in that murder, knowing that the police

were looking for it and that it was loaded with hollow point ammunition. (App. 114-115, 273-274). Weeks was armed with the loaded pistol on the night of the capital murder.

Thus, when Cavazos stopped his car, Weeks was nervous because he was on probation and knew that the car was stolen. (App. 121). After the trooper looked at Dukes' driver's license and a piece of paper from the glove compartment, Cavazos directed Dukes and then Weeks to get out of their vehicle. In his subsequent confession to the police, Weeks acknowledged that Cavazos was friendly during the encounter. (Oct. 20, 1993, Tr. 35).

As he got out of the car, Weeks took the Glock 17 pistol from underneath the floor mat and held it down by his side. He said he considered throwing the gun over a rail on the overpass of the exit ramp but then, according to his trial testimony, "an evil spirit" entered him. (App. 123). Weeks then shot Trooper Cavazos, whose gun was still strapped in his holster, six times without warning or provocation. (App. 274-275). Two of the shots would have been independently fatal. (App. 295). One fatal wound penetrated the neck, the aorta, the pulmonary artery, and the left lung. (Oct. 19, 1993, Tr. 134-135). The second fatal wound entered the left side of the trooper's chest at the level of his clavicle and caused a "massive hemorrhage" at the axillary artery and vein in Cavazos' left armpit. (*Id.*, Tr. 137). The four remaining shots entered the trooper's forearms and left wrist. (*Id.*, Tr. 166-169).

Within minutes of the shooting, Officer James Virgil of the Prince William County Police Department came upon Weeks and Dukes at a motel located about 1/2 mile

from the exit ramp. (App. 276). The two men, who claimed that they had heard gunshots, consented to remain at the motel and wait for an officer who could speak with them. (App. 277). Later that morning, Special Agent J. K. Roland of the Virginia State Police questioned Weeks in a motel room, while Dukes was questioned in another motel room. Shortly after Roland advised Weeks of his *Miranda* rights, another trooper informed Roland that Dukes had admitted that Weeks had shot Trooper Cavazos. Consequently, at 7:52 a.m. Roland arrested Weeks for the murder. (App. 280). At about 6:00 p.m. on February 24, 1993, Weeks gave the police a full confession. (App. 281-282).

B. Trial Court Proceedings

Weeks then was indicted and prosecuted pursuant to Virginia Code § 18.2-31(6), which makes the "willful, deliberate, and premeditated killing of a law-enforcement officer . . . when such killing is for the purpose of interfering with the performance of his official duties" capital murder. The trial court conducted jury voir dire on October 18, 1993. Upon the parties' agreement, panels of four prospective jurors were questioned, first by the trial judge and then by the Commonwealth's Attorney and defense counsel. Without exception, the trial judge asked the panels, in the event they were to convict Weeks of capital murder, would they "be able to consider voting for a sentence less than death in this matter?" (App. 17, 27, 38, 43, 50, 59). Similarly, the trial court asked each panel member: "Could you consider the imposition of a life sentence as opposed to the death penalty, even though you may have convicted the Defendant of capital

murder? Could you consider life as well as death?" (App. 17-18, 28, 59).

During his questioning of the various jury panels, the Commonwealth's Attorney asked, in substantially similar language, the following questions:

> MR. EBERT: I think all of you understand that the charge of capital murder, the Defendant is charged with a crime that **permits** the imposition of the death penalty. Do you understand that?
>
> JURY PANEL: (Indicating in the affirmative.)
>
> MR. EBERT: In the trial we have what we call a bifurcated proceeding. It means that you will hear evidence as to whether or not the Defendant is guilty or innocent. **If you find that the Defendant is guilty, then you would come back and hear more evidence and determine whether or not you feel the death penalty is appropriate. You understand that?**
>
> JURY PANEL: (Indicating in the affirmative.)
>
> MR. EBERT: Will you be willing to consider **all the evidence** of both aspects of this trial proceeding?
>
> JURY PANEL: (Indicating in the affirmative.)
>
> * * *
>
> MR. EBERT: **[I]f the Defendant were to be convicted there would be two options under the law to which he could be sentenced. One, of course, would be the death penalty and the other would be life imprisonment. Could you fairly consider both of those options?**
>
> JURY PANEL: (Indicating in the affirmative.)

> MR. EBERT: **It would depend upon the evidence and the circumstances and the law as to what penalty you would impose; is that correct?**
>
> JURY PANEL: (Indicating in the affirmative.)

(App. 18-20; Oct. 18, 1993, Tr. 45, emphasis added).

During his own questioning of the venire, defense counsel repeatedly asked the prospective jurors about their willingness to consider any mitigating evidence presented by Weeks. For example, Weeks' attorney conducted the following voir dire of one panel:

> MR. BAKER: The next three questions deal with something called mitigation. I'll define the term. Mitigation is something that lessens the offense. In other words, you have done the offense, but because of these circumstances, you would consider it worthy of a lesser sentence. That's the best way I can define it.
>
> I'll ask if you could consider these factors as matters in mitigation. Do you understand my definition?
>
> (Ms. Rogers and Mr. Dobyns indicated in the affirmative.)
>
> MR. BAKER: Could you consider youth as a factor in mitigation, the Defendant's youth?
>
> (Ms. Rogers and Mr. Dobyns indicated in the affirmative.)
>
> MR. BAKER: Could you consider the fact that he lost his mother and father at an early age as a factor in mitigation?
>
> (Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

> MR. BAKER: Could you consider the fact that he was remorseful as a factor in mitigation; remorse meaning sorry?
>
> (Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

(App. 31-32).

The guilt phase of the trial occurred on October 19-20, 1993. At the outset of the proceeding, Weeks pled guilty to use of a firearm in the commission of the capital murder and a related grand larceny charge and was sentenced to respective prison terms of three years and ten years. At the conclusion of the guilt stage, the jury convicted Weeks of capital murder, and the case proceeded to the penalty phase of the bifurcated trial.

The penalty phase was conducted on October 21-22, 1993. During his opening statement, the Commonwealth's Attorney reminded the jurors that they had taken an oath, "and you are to consider certain evidence now, as well as the evidence that you've heard, and determine what is the appropriate sentence. . . . " (App. 85). The prosecutor concluded: "I would ask you, after you've heard **all of the evidence, to weigh it carefully** [and] I would ask you to sentence him to death in accordance with law and in accordance with the evidence." (Oct. 21, 1993, Tr. 11-12, emphasis added).

In the defense's opening statement, Weeks' attorney stated that "what the jury must now do is decide the two alternatives that are open to them. That is, one, death; and the other, life in prison." (App. 86). Defense counsel then alluded to the mitigating evidence about Weeks' background that he intended to present and stated that

"you as the jury **will have to consider this.**" (App. 87, emphasis added). Defense counsel concluded: "[T]his is an individual that you will see the human side of him. . . . [T]he question will be, should he pay the ultimate price for this, or is there enough goodness in this individual that this jury could find mercy in its heart to spare his life." (App. 87).

Thereafter, in addition to reintroducing its evidence from the guilt phase, the Commonwealth offered Weeks' 1992 North Carolina drug conviction order, as well as the testimony of his probation officer, who described the numerous acts committed by Weeks that had violated the terms of his probation. (Oct. 21, 1993, Tr. 25-31). Additionally, Linda Cavazos, the widow of Trooper Cavazos, and three Virginia State Police officers testified about the victim and the impact of his murder upon his family and fellow officers. (App. 94-104; Oct. 21, 1993, Tr. 56-61).

The defense then presented the testimony of ten witnesses in mitigation, including Weeks himself. Weeks' testimony consumed 110 pages of the trial transcript, most of which dealt with his upbringing, the circumstances under which he came to Virginia, and the events culminating in Trooper Cavazos' murder. Among other things, Weeks, who was 20 years old at the time of the murder, testified that his grandmother, Evelyn Leach, started raising him while he was in the eighth grade. (App. 106-107). Mrs. Leach provided him with a good home and guidance, and up until the time he graduated from high school, Weeks regularly attended church. (App. 110). Weeks also was a starting player on his high school basketball team and received college scholarship offers. (App. 109).

Mrs. Leach and Trina Hammond, Weeks' half-sister, also testified about his upbringing. (App. 156-161, 166-175). These witnesses described Weeks' adverse reaction to the death of his father and his abandonment by his mother when he was a teenager. (App. 156-161, 166-168). Seven other friends of Weeks' also testified about his upbringing and the efforts they made to help him. (App. 130-150, 162-166).

Weeks and several other defense witnesses testified that, after he graduated from high school, he quit going to church and began a downward spiral that led to his arrest and conviction in 1992 for conspiracy to possess marijuana with intent to distribute. Finally, Weeks described the circumstances that led up to Trooper Cavazos stopping his car. Weeks admitted that he had shot the trooper several times but claimed that he had panicked. (App. 121-123).

The trial court then instructed the jury. Instruction No. 2, to which Weeks raised no objection, stated, in pertinent part:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or imprisonment for life. . . . Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> 1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
>
> 2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.
>
> **If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment. . . .**
>
> If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment. . . .

(App. 192-193, emphasis added).

Additionally, the trial court granted Weeks' Instruction B-1, which explicated the concept of mitigating evidence thusly:

> Mitigation evidence is not evidence offered as an excuse for the crime of which you have found defendant guilty. Rather, it is any evidence which in fairness may serve as a basis for a sentence less than death. **The law requires your consideration of more than the bare facts of the crime.**

> Mitigating circumstances may include, but not be limited to, any facts relating to defendant's age, character, education, environment, life and background, or any aspect of the crime itself which might be considered extenuating or tend to reduce his moral culpability or make him less deserving of the extreme punishment of death.
>
> **You must consider a mitigating circumstance** if you find there is evidence to support it. The weight which you accord a particular mitigating circumstance is a matter of your judgment.

(App. 195, emphasis added).[1]

During the Commonwealth's closing argument, the Commonwealth's Attorney discussed such matters as the circumstances surrounding Weeks' slaying of Trooper Cavazos, along with the mitigating evidence that the defense had presented. (App. 200-207). Among other things, the Commonwealth's Attorney argued:

> [Weeks] killed Jose Cavazos because it was good for him to do it. It would help him, or so he thought, and no other reason.
>
> And it is because of that, that the death penalty is the only appropriate sentence in this case.

---

[1] Weeks agreed to the deletion of the last sentence of this instruction, as originally submitted, which stated: "However, you may not refuse to consider the evidence that has been presented in mitigation." (App. 189).

> If he had gotten on the witness stand and told you the truth, perhaps a life sentence would be appropriate.
>
> * * *
>
> Why couldn't he tell us the truth yesterday? If he wants mercy, and his lawyers are going to use that word, shouldn't he be truthful with us first?
>
> * * *
>
> I ask you to impose the most serious penalty that the law allows, for this most serious of crimes.

(App. 202, 203, 207).

In his own closing argument, defense counsel similarly discussed the events culminating in Trooper Cavazos' death as well as the aggravating and mitigating evidence that the parties had adduced. (App. 207-213). In part, defense counsel argued:

> I stand before you . . . to argue that my client should receive a penalty of less than death, because that's what this trial has boiled down to; life or death.
>
> * * *
>
> [W]hen you decide on your sentence in this case, you do have two alternatives; life or death.
>
> I would ask you to consider that for eighteen years this was a pretty decent person, that he stayed out of trouble for that long, under difficult circumstances.
>
> * * *

> The Commonwealth had alluded to you, in order to . . . fix this defendant's sentence of death, you must find two things, and that is that. . . .

(App. 207, 211, 212).

At this point, the Commonwealth's Attorney interposed an objection that under state law the Commonwealth had to prove only one of the statutory aggravating predicates, not both, in order for the jury to consider the death penalty. *See* Virginia Code § 19.2-264.4. Defense counsel acknowledged his error and resumed his argument:

> I made a mistake, there are two factors you can consider, either one of which would justify a death sentence [*i.e.*, Weeks' "future dangerousness" or the "vileness" of the murder.] **Now, you could still find that he meets both of these criterias [*sic*], and not sentence him to death.**
>
> **I believe you will read that in the instructions.**
>
> * * *
>
> [T]he issue is whether you should sentence this defendant, Lonnie Weeks, Jr., to death, or you feel from the evidence, and the Judge has given you an instruction with respect to what you can consider, that he deserves the other alternative, which is life.

(App. 212-213, emphasis added).

In rebuttal, the Commonwealth's Attorney specifically acknowledged: "We have the death penalty and **you don't have to impose it, but all of you have taken an oath that you can consider both options.**" (App. 214,

emphasis added). The Commonwealth's Attorney also argued:

> You've heard the evidence and you folks are going to have to determine what the appropriate punishment is in this case.
>
> * * *
>
> I would say to you folks that if you are going to have the death penalty, this case is the type of case that it is designed for.
>
> * * *
>
> [Weeks] got on the stand yesterday, folks, and he told you certain things for one reason and one reason alone, and that was to mitigate the punishment that you are entitled to impose on him, that you've sworn to consider, under the law.
>
> **I say to you if you believe what he said on the stand yesterday, sentence him to life.** If you don't, and you believe that the type of person that he is, that he was trying to serve himself, I say sentence him to death, but you folks be the judge of that.

(App. 214-215, emphasis added).

The jury began its penalty deliberations at approximately 10:40 a.m. on October 22, 1993. (App. 219). At approximately noon, the jury submitted a question concerning Weeks' parole eligibility, to which the trial judge, over Weeks' objection, responded: "You should impose such punishment as you feel is just under the evidence, and within the instructions of the Court. You are not to concern yourself with what may happen afterwards." (App. 219).

After taking a one-hour luncheon recess from approximately 12:40 p.m. to 1:40 p.m., the jury resumed its deliberations. (App. 220-222). At approximately 3:15 p.m., the jury submitted the following question:

> If we believe that Lonnie Weeks, Jr., is guilty of at least 1 of the alternatives, then is it our duty as a jury to *issue* the death penalty? or must we *decide* (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify.

(App. 217, emphasis in original). During a colloquy with opposing counsel concerning its possible reply to the jury, the trial court stated that it did not believe it could answer the question any more clearly than to refer to Instruction No. 2. Defense counsel objected and requested that the court inform the jury that even if it found one or both aggravating factors beyond a reasonable doubt, it still could impose a life sentence. (App. 223). The trial court, however, provided this written response to the jury: "See second paragraph of Instruction #2 (Beginning with 'If you find from. . . .')." (App. 217). The trial judge reasoned that this particular paragraph of Instruction No. 2 did "exactly what" Weeks' proffered answer did and "answers their precise question. I think they just have to be drawn to that paragraph to find their answer." (App. 224).

Without asking any follow-up questions and after deliberating for more than two additional hours, the jury returned with a verdict at 5:31 p.m. (App. 224-225). Although the trial court had submitted to the jury both statutory aggravating factors, the jury, which was given

five possible verdict forms, based its death sentence solely upon a finding of the "vileness" circumstance. (App. 196-198, 228). The jury's verdict, moreover, specifically stated that the jury had "considered the evidence in mitigation of the offense. . . . " (App. 228). The trial court then polled the members of the jury, all of whom assented to the verdict. (App. 225-226).

Pursuant to Virginia Code § 19.2-264.5, the trial court conducted a post-trial hearing on January 13, 1994, and imposed the death sentence. The trial court entered final judgment on January 14, 1994.

C. Direct Appeal

On direct appeal to the Supreme Court of Virginia, Weeks' brief included as Assignment of Error 41: "The trial court erred in refusing to give the jury defendant's proposed instruction 'C1' or to otherwise fully and properly instruct the jury regarding their option to give effect to mitigating evidence by sentencing the defendant to life in prison even if they found one or all of the statutory 'aggravating factors' beyond a reasonable doubt, in light of the nature of the offense charged, the evidence adduced at trial and the law applicable thereto." (App. 252). In support of this Assignment, Weeks' only argument on brief was that "instruction C1 was a correct statement of the law under *Penry [v. Lynaugh*, 492 U.S. 302 (1989)], was not needlessly redundant, and was materially vital to the defendant; it should therefore have been given to the jury by the court." (App. 267-268).

Weeks' Assignment of Error 44 stated: "The trial court erred in refusing, in response to a specific jury

request for clarification, to specifically instruct the jury that if they found one or more aggravating factors beyond a reasonable doubt, they could sentence the defendant to life in prison or to death." (App. 253). Weeks' entire "argument" in support of this assigned error was as follows: "The defendant relies on the argument set forth under the *41st Assigned Error, supra,* in response to the question presented on this error. This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia." (App. 270).

On November 4, 1994, the state court affirmed Weeks' capital murder conviction and death sentence. *Weeks v. Commonwealth*, 450 S.E.2d 379 (Va. 1994). In response to the Commonwealth's argument in its brief that Weeks had defaulted Assignment of Error 44 by offering no supporting argument, the state court noted that Weeks had "effectively present[ed] no argument in support of five . . . alleged errors (Nos. 16, 34, 44, 45, and 46). . . . We have considered these so-called arguments and find no merit in any of the five." (App. 275). Later in its opinion, the state court remarked that Weeks had advanced "a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. We have considered all the arguments in support of those issues and conclude that none has any merit." (App. 292).

The Virginia Supreme Court denied Weeks' petition for rehearing on January 13, 1995. This Court denied certiorari review on October 2, 1995. *Weeks v. Virginia*, 516 U.S. 829 (1995).

D. State Collateral Proceedings

On December 4, 1995, Weeks filed his state habeas corpus petition in the Virginia Supreme Court, but raised no claim attacking the trial court's response to the jury's penalty phase question. On March 15, 1996, the state court dismissed the petition as jurisdictionally barred, because it was untimely filed under Virginia Code § 8.01-654.1 and Virginia Supreme Court Rule 5:7A(a). On June 7, 1996, the Virginia Supreme Court denied Weeks' petition for rehearing.

E. Federal Collateral Proceedings

Weeks next filed a federal habeas petition on February 7, 1997, in the United States District Court for the Eastern District of Virginia. For the first time, Weeks presented a specific claim that the trial court, in response to the jury's question, had been obligated by the Constitution to do something more than refer the jury to the specific portion of the penalty-stage instructions that set forth the circumstances under which it could impose a death sentence. (App. 297-302). On April 1, 1998, the district court dismissed Weeks' petition and ruled, in relevant part, that the Virginia Supreme Court's disposition of Weeks' "claim" on direct appeal challenging the trial court's response to the jury's inquiry was reasonable within the meaning of 28 U.S.C. § 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Weeks v. Angelone*, 4 F. Supp. 2d 497, 536 (E.D. Va. 1998).[2]

---

[2] In his Report and Recommendation dated July 30, 1997, the Magistrate Judge had reached a similar conclusion. 4

On May 10, 1999, the United States Court of Appeals for the Fourth Circuit unanimously affirmed the district court's denial of collateral relief. *Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999). With respect to Weeks' current claim, the Fourth Circuit first ruled that the Supreme Court of Virginia's two references in its appellate opinion about the lack of "merit" in Weeks' claims warranted the conclusion that the state court had not rejected Weeks' claim as procedurally defaulted. (App. 340-342). The Court of Appeals, however, concluded that under § 2254(d), as well as under a *de novo* standard of review, Weeks was not entitled to federal habeas relief. (App. 342-346 and 346 n.5). The Fourth Circuit reasoned that here, much as in *Buchanan v. Angelone*, 522 U.S. 269 (1998), the circumstances of Weeks' trial demonstrated "that no reasonable juror would have understood [the penalty-stage instructions] to preclude the consideration of mitigating evidence even upon a finding of an aggravating factor." (App. 345). On June 4, 1999, the Court of Appeals, without dissent, denied Weeks' petition for rehearing and suggestion for rehearing en banc.

On July 7, 1999, pursuant to Virginia Code § 53.1-232.1, the state trial court set Weeks' execution for September 1, 1999. On August 16, 1999, Weeks filed his certiorari petition and stay application in this Court. On September 1, 1999, this Court entered an order staying

---

F. Supp. 2d at 536. In its final opinion dismissing Weeks' petition, the district court overruled Weeks' objection to the Magistrate Judge's recommendation on this issue. *Id.* The Magistrate Judge had rejected the respondent's argument that the claim was defaulted because it had not been fairly presented to the Virginia Supreme Court on direct appeal.

Weeks' execution and granting the petition, limited to Question 1, *i.e.*, whether in response to the jury's question the trial judge had been obligated by the Constitution to do more than refer the jury to the specific portion of the penalty-stage instructions dealing with its sentencing alternatives. (App. 378).

SUMMARY OF ARGUMENT

Consistent with the principles of comity and finality that inform federal collateral review of presumptively valid state court judgments, state prisoners must fairly present their federal constitutional claims to the state courts before bringing them to federal court. A prisoner's failure to do so constitutes a procedural default that normally is preclusive of federal collateral relief.

Weeks' sole challenge on direct appeal to the trial judge's answer to the jury's question about its sentencing alternatives was a one-sentence assignment of error supported only by a one-sentence "argument" on the discrete (and now abandoned) issue of the facial validity of the penalty phase jury charge. Consequently, because Weeks did not brief his present Eighth Amendment claim on direct appeal, and the Supreme Court of Virginia necessarily did not reach the merits of that claim, Weeks' procedural default bars federal review.

It is axiomatic, moreover, that a trial judge enjoys broad discretion in determining how to respond to a jury's request for supplemental instructions. When Weeks' case became final in 1995, numerous courts had held that a trial court does not abuse its discretion by

referring the jury to accurate instructions that it already has been given. And, this Court certainly never has held that a judge's reliance upon an original, valid jury charge in responding to a jury's question is unconstitutional.

Under the "new rule" doctrine established in *Teague v. Lane*, 489 U.S. 288 (1989), as well as under 28 U.S.C. § 2254(d), it is clear that, as of the time Weeks' case became final, a state court reasonably could have rejected his Eighth Amendment claim. Indeed, a reasonable jurist could have found that Weeks' present claim merely challenged a trial judge's discretionary response to a procedural incident at trial and did not even implicate the Constitution.

Finally, under the "reasonable likelihood" test promulgated in *Boyde v. California*, 494 U.S. 370 (1991), Weeks plainly suffered no constitutional violation. The voir dire, the opening statements and closing arguments of counsel, and Weeks' lengthy presentation of mitigating evidence all repeatedly reinforced the twin principles that the jury was not obligated to impose a death sentence upon the mere finding of a statutory aggravator and that the jury was obliged to consider all the evidence, including Weeks' mitigating evidence, before deciding his punishment. When the jury asked a question during the penalty phase deliberations seeking additional information about the sentencing process, the trial judge properly referred it to the specific portion of the standard Virginia instruction – the same instruction that this Court upheld in *Buchanan v. Angelone*, 522 U.S. 269 (1998) – that answered the jury's inquiry. The fact that the jury deliberated more than two additional hours, did not ask any follow-up questions, based its verdict solely on the "vileness" circumstance

while rejecting the "future dangerousness" predicate, and stated in its verdict that it had considered the evidence in mitigation of the offense shows that there is no possibility, much less a reasonable likelihood, that Weeks' jury believed itself precluded from considering his mitigation evidence.

ARGUMENT

I. WEEKS' CONSTITUTIONAL CLAIM IS DEFAULTED BECAUSE HE NEVER FAIRLY PRESENTED IT IN STATE COURT.

Two closely-related principles of federal habeas corpus jurisprudence – exhaustion and procedural default – intersect at the very threshold of collateral review of state court judgments and, in part, establish the boundaries within which such federal review may proceed. The record in this case demonstrates that Weeks did not fairly present his constitutional claim on direct appeal to the Supreme Court of Virginia, thereby resulting in a procedural default. *See Smith v. Murray*, 477 U.S. 527, 533-537 (1986). Weeks has exhausted his present claim, but only because of his preclusive default.[3] *See Teague v. Lane*, 489 U.S. 288, 297-299 (1989).

---

[3] As the prevailing party, respondent was not required to cross-petition in order to challenge the Fourth Circuit's rejection of his default defense. *See Jones v. United States*, 119 S.Ct. 2090, 2105-2106 (1999). Respondent affirmatively asserted the default defense in his brief in opposition to Weeks' certiorari petition. (Br. Op. at 4 n.2).

This Court consistently has required state prisoners fairly to present the substance of their federal constitutional claim to the state courts, in order to exhaust their state court remedies. *See Picard v. Connor*, 404 U.S. 270, 275 (1971). Merely citing "book and verse on the federal constitution" does not afford a state court "a fair opportunity" to consider the defendant's federal constitutional claim. *Id.* at 276, 278. Thus, this Court concluded in *Connor* that the defendant's presentation on direct appeal of certain state law and Fifth Amendment claims did not exhaust his related equal protection claim even though he had "presented all the facts" relevant to the latter issue. *Id.* at 277.

Since *Connor*, this Court regularly has applied this "fair presentation" test in assessing exhaustion issues. For example, in *Anderson v. Harless*, 459 U.S. 4 (1982), the Court stated that exhaustion requires more than "that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Id.* at 5 (citation omitted). Thus, this Court held that the petitioner had not exhausted his federal constitutional burden-shifting claim, when on direct appeal he relied only upon state law and the state appellate court had analyzed his claim in similar state law terms. *Id.* at 6-7.

More recently, in *Duncan v. Henry*, 513 U.S. 364 (1995) (*per curiam*), this Court ruled that Henry's argument on direct appeal challenging the admission of certain evidence as a "miscarriage of justice" under the California Constitution did not exhaust his federal habeas due process challenge to the same evidence. In holding that the

prisoner's direct appeal argument did not satisfy *Connor*'s "fair presentation" requirement, the Court noted that in the state court he expressly had raised a "due process" claim on a separate issue and that the state appellate court had analyzed his evidentiary claim solely in non-constitutional terms. *Id.* at 366.

A review of the claim Weeks presented to the Virginia Supreme Court on direct appeal establishes that he did not fairly advance his present constitutional claim on direct appeal. Indeed, he did not present the claim **at all**, fairly or otherwise.

Weeks no longer contests the facial adequacy of the penalty phase jury charge; instead, his argument addresses solely the trial court's response to the jury's question about its sentencing options. (Pet. Br. at 19-22). Yet, on direct appeal, the **sole** claim relevant to these matters that Weeks briefed was that the trial court had erred in denying his proposed instruction C-1, thereby failing to instruct the jury that it could give effect to the mitigating evidence and impose a life sentence even if it found one or both statutory aggravators. Weeks never briefed any claim in the Virginia Supreme Court regarding the constitutionality of the trial court's response to the jury's later question.

A review of Assignments of Error 41 and 44 confirms these points. Weeks did brief an argument in support of Assignment of Error 41 that challenged the facial validity of the penalty-phase jury instructions. (App. 267-268). In sharp contrast, Weeks offered **no** argument to support his Assignment of Error 44, other than to adopt and incorporate by reference his prior argument addressing Assignment of Error 41. (App. 270). Thus, the only "argument"

that Weeks briefed in the Virginia Supreme Court in support of Assignment of Error 44 was one that he now has abandoned.[4]

Only if the mere filing of Assignment of Error 44, by itself, could be deemed a fair presentation of his present claim would there be any basis for concluding that Weeks had preserved the claim for federal review. Relevant state law, however, plainly dictates the opposite conclusion. The Virginia Supreme Court's Rules 5:17(c) and 5:27 require an opening brief to include both "Assignments of Error . . . list[ing] the specific errors . . . upon which the appellant **intends to rely**" and "[t]he principles of law, **the argument**, and the authorities **relating to each assignment of error.**" (Emphasis added). Rule 5:17(c) also requires an appellant to list "Questions Presented" separately, that is, "the questions upon which the appellant **intends to submit argument**. . . . "[5] (Emphasis added). The purpose of an assignment of error in Virginia " 'is to point out the errors with reasonable certainty in order to direct [the appellate] court and opposing counsel to the points on which appellant **intends to ask** a reversal of the judgment, and to limit **discussion to these points**.' " *Yeatts v. Murray*, 455 S.E.2d 18, 21 (Va. 1995) (emphasis added).

---

[4] He had no choice but to abandon it because, as will be demonstrated, this Court's subsequent decision in *Buchanan v. Angelone*, 522 U.S. 269 (1998), rejected the very same claim.

[5] These provisions are much like this Court's Rule 24.1, which, in paragraphs (a) and (i), requires an appellant to include in his brief the "questions presented for review" and the "argument," respectively.

It is rudimentary Virginia law, moreover, that an assignment of error, unaccompanied by a legal argument, will not be addressed on appeal. *See, e.g., Stockton v. Commonwealth*, 402 S.E.2d 196, 210 (Va.), *cert. denied*, 502 U.S. 902 (1991); *Savino v. Commonwealth*, 391 S.E.2d 276, 283 n.4 (Va.), *cert. denied*, 498 U.S. 882 (1990). Indeed, in Weeks' very own direct appeal, the Virginia Supreme Court similarly declined to review ten assignments of error that he had not briefed. (App. 275).

It is true that, after noting that Weeks had "effectively present[ed] no argument in support of five" additional assignments of error, including Assignment of Error 44, the state court then remarked: "We have considered these **so-called arguments** and find no merit in any of the five." (App. 275, emphasis added). This statement, however, did not signal the Supreme Court of Virginia's disregard of Weeks' procedural default as to Assignment of Error 44. Even if the state court's reference to the lack of "merit" in Assignment of Error 44 were deemed a rejection of a legal argument, such a ruling logically could have referred only to Weeks' now-abandoned challenge to the validity of the initial jury charge, the sole argument he briefed in support of this assignment of error.

The state court's later statement that Weeks had raised "a number of miscellaneous issues dealing with, [in part,] inquiries by the jury during its deliberations. . . . and that none has any merit" does not alter this conclusion. (App. 292). Significantly, the Virginia Supreme Court stated it had "considered all the arguments in support of those issues" in concluding that they lacked

merit. (*Id.*). Again, inasmuch as Weeks offered no "argument" in his entire brief that the trial court's response to the jury's question was constitutionally deficient, the state court's finding of "no merit" could not have referred to Weeks' present claim.

In sum, this Court may reach the merits of Weeks' claim only if it is prepared to hold that a one-sentence assignment of error, accompanied only by a one-sentence reference to a separate issue, amounted to a "fair presentation" of Weeks' present constitutional claim and that the Virginia Supreme Court thereby had a "fair opportunity" to address this phantom claim. Because this Court's prior decisions do not permit such an evisceration of the exhaustion and default doctrines, this Court should conclude that Weeks' claim is barred.

II. WEEKS' CLAIM, IF ACCEPTED, WOULD CONSTITUTE AN IMPERMISSIBLE "NEW RULE," AND RELIEF LIKEWISE IS BARRED UNDER 28 U.S.C. § 2254(d).

In assessing the reviewability of Weeks' claim under the "new rule" doctrine, it is critical to bear in mind exactly what Weeks does, and does **not**, argue in this Court. First, there is no claim that Weeks' right to present mitigating evidence was unconstitutionally restricted; his brief is replete with a description of the mitigating evidence that he presented. (Pet. Br. at 3-10). Indeed, Weeks aptly states that the "story of [his] life was told at sentencing." (Pet. Br. at 3). Second, this case does not involve an erroneous or even ambiguous jury instruction that

might have unconstitutionally restricted the jury's consideration of the mitigating evidence or "affirmatively misled [it] regarding its role in the sentencing process." *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).[6] Finally, Weeks does not assert, nor could he, that the trial court's response to the jury's question misstated the law. At no point during the trial did the jury **ever** receive misinformation concerning the nature of the penalty proceeding or its role in sentencing Weeks. *See Jones v. United States*, 119 S.Ct. 2090, 2098-2099 (1999).

Thus, the **sole** argument before this Court is that Weeks suffered an Eighth Amendment violation as a result of the trial court's decision to answer the jury's question by directing it to review an instruction that accurately explicated its sentencing options and that this Court expressly upheld in *Buchanan*. If ever a claim amounted to a non-cognizable "new rule," Weeks' claim is it.

This Court **never** has held that a trial judge acted unconstitutionally in answering a jury's question by referring it to the original (and valid) instructions, much less committed constitutional error under circumstances even remotely equivalent to those in the present case.

---

[6] In the Fourth Circuit, Weeks expressly conceded that in *Buchanan v. Angelone* this Court upheld "a capital sentencing instruction almost identical to the one used by Weeks' jury. . . ." (App. 324). Weeks also referred to Instruction No. 2 and the remainder of the jury charge as "a facially constitutional instruction," "constitutionally-sufficient," and "technically flawless." (App. 323, 325, 326). In his certiorari petition, moreover, Weeks stated that "pattern instruction #2 presented a simple decisional tree that ordinary jurors ought to be able to follow. . . ." (Pet. at 6).

Numerous courts of appeals, moreover, repeatedly have held that a trial court has substantial discretion in determining the extent or nature of any response to a jury's request for supplemental instructions and, even more to the point, have held that a trial judge may direct the jury to re-read the original jury instructions if those instructions accurately address the matter alluded to in the jury's question.

In *Teague v. Lane*, this Court held that new federal constitutional rules cannot be announced or applied on federal habeas review unless either of two narrow exceptions exists. The Court stated that "a case announces a new rule if the result was not **dictated** by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301 (emphasis in original). Consistent with principles of comity and finality, the "new rule" doctrine "validates reasonable, good-faith interpretations of existing precedents made by state courts even if they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 (1990); *see also O'Dell v. Netherland*, 521 U.S. 151, 166 (1997); *Saffle v. Parks*, 494 U.S. 484, 488 (1990). So long as the result " 'was susceptible to debate among reasonable minds' " at the time the prisoner's conviction became final, a federal habeas court may not grant relief merely because it disagrees with the result reached by the state court. *Graham v. Collins*, 506 U.S. 461, 476 (1993).

In resolving "the determinative question [as to] whether reasonable jurists" who "survey[ed] the legal landscape" as it existed at the time the prisoner's case became final would have been obligated to accept his claim, *Graham*, 506 U.S. at 468, 477, this Court has relied upon federal and state authority adverse to the prisoner's

position as a basis for invoking *Teague*. *See, e.g., O'Dell*, 521 U.S. at 166 n.3; *Lambrix v. Singletary*, 520 U.S. 518, 534-538 (1997); *Caspari v. Bohlen*, 510 U.S. 383, 393-395 (1994); *Parks*, 494 U.S. at 490-491, 494; *Butler*, 494 U.S. at 415. *See also Goeke v. Branch*, 514 U.S. 115, 118-119 (1995) (prisoner's failure to identify "existing or well-settled authority" demonstrated that *Teague* barred review of claim challenging dismissal of appeal based on his failure to appear at sentencing). The Court also has relied upon decisions that were against the weight of authority, as well as dissenting opinions in its own earlier cases, to hold that *Teague* barred review of a federal habeas claim.

Thus, in *Sawyer v. Smith*, 497 U.S. 227 (1990), the fact that the Court's "earlier Eighth Amendment cases lent general support to the conclusion reached in *Caldwell" v. Mississippi*, 472 U.S. 320 (1985), did not mean that *Caldwell* was not a "new rule" under *Teague*. 497 U.S. at 236. *See also Parks*, 494 U.S. at 491 (*Teague* barred review of claim that certain mitigating evidence had been wrongly disallowed; even if this Court's prior decisions "inform, or even control or govern, the analysis of [Parks'] claim, it does not follow that they compel the rule that Parks seeks"). Finally, even cases decided after a prisoner's conviction has become final are relevant to the *Teague* inquiry, so long as they were decided adversely to him. *See Bohlen*, 510 U.S. at 395-396; *Gilmore v. Taylor*, 508 U.S. 333, 341-342 (1993); *Graham*, 506 U.S. at 472-475.

By the time Weeks' case became final on October 2, 1995, one court of appeals after another had ruled that a trial court has substantial discretion in responding to a jury's request during its deliberations for supplemental

instructions.[7] More specifically, numerous courts had held that a trial court properly could answer a jury's request for supplemental instructions by referring it to the original charge, so long as that charge correctly set forth the controlling legal principles in the case.

For example, in *United States v. Walther*, 867 F.2d 1334 (11th Cir. 1989), the Eleventh Circuit rejected an argument virtually identical to Weeks'. There, the defendants were convicted of various drug offenses in connection with a "reverse sting" undercover operation. At trial, two of the defendants raised an entrapment defense. After the district court gave the jury instructions on the entrapment defense that previously had been approved by the Eleventh Circuit, the jury interrupted its deliberations to ask a question about the correct allocation of the burden of proof in evaluating the entrapment defense. Over the defense's objection, the district court instructed the jury to review its original instructions. 867 F.2d at 1341.

On appeal, the defendants argued that the district court's failure to give a supplemental entrapment instruction had been reversible error and that the district court

---

[7] *See, e.g., United States v. Smith*, 62 F.3d 641, 646 (4th Cir. 1995), *appeal after remand*, 91 F.3d 136 (1996); *United States v. Dorri*, 15 F.3d 888, 892 (9th Cir.), *cert. denied*, 513 U.S. 1004 (1994); *United States v. Stowell*, 947 F.2d 1251, 1257 (5th Cir. 1991); *United States v. Beverly*, 913 F.2d 337, 357 (7th Cir. 1990); *United States v. Laing*, 889 F.2d 281, 290 (D.C. Cir. 1989), *cert. denied sub nom., Martin v. United States*, 494 U.S. 1008 (1990); *United States v. Ladd*, 885 F.2d 954, 961 (1st Cir. 1989); *United States v. Civilli*, 883 F.2d 191, 195 (2d Cir. 1989); *United States v. Walther*, 867 F.2d 1334, 1341 (11th Cir. 1989); *United States v. White*, 794 F.2d 367, 370 (8th Cir. 1986).

improperly had referred the jury "to the very instruction which confused it in the first instance." 867 F.2d at 1341. The Eleventh Circuit, however, upheld the district court's response to the jury:

> The extent and character of supplemental instructions are within the sound discretion of the trial court. The appellants did not object to the original instructions [and on appeal] admitted that the original instructions were proper. Merely having the jury reconsider the correct instructions cannot constitute error nor an abuse of discretion. Accordingly, we hold that the district court did not err nor abuse its discretion in refusing to give a supplemental instruction on the entrapment defense.

867 F.2d at 1341 (citation omitted).

The holding in *Walther* is hardly unique. On the contrary, numerous courts had ruled prior to October of 1995 that trial judges do not abuse their discretion or commit reversible error by referring the jury back to the original jury charge (or simply declining to answer the jury's question). *See, e.g., United States v. Dorri*, 15 F.3d 888 (9th Cir. 1994); *United States v. Keeper*, 977 F.2d 1238, 1242 (8th Cir. 1992); *United States v. Barsanti*, 943 F.2d 428, 437-438 (4th Cir. 1991); *United States v. Atterson*, 926 F.2d 649, 659 (7th Cir. 1991); *United States v. Beverly*, 913 F.2d 337, 357 (7th Cir. 1990); *United States v. Mealy*, 851 F.2d 890, 901-902 (7th Cir. 1988); *United States v. Bailey*, 830 F.2d 156, 157 (11th Cir. 1987); *United States v. White*, 794 F.2d at 370; *United States v. Kimmel*, 777 F.2d 290, 293-294 (5th Cir. 1985); *Davis v. Greer*, 675 F.2d 141, 145-146 (7th Cir.), *cert. denied*, 459 U.S. 975 (1982). *See also United States v. Gibbons*, 968 F.2d 639, 646 (8th Cir. 1992); *United States v.*

Caro, 965 F.2d 1548, 1555 (10th Cir. 1992). And, the rule is no different in cases decided since Weeks' case became final. *See, e.g., United States v. Span*, 170 F.3d 798, 801-802 (7th Cir. 1999); *United States v. Smith*, 104 F.3d 145, 148-149 (8th Cir. 1997); *United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996); *United States v. Mejia*, 82 F.3d 1032, 1037 (11th Cir. 1996).[8]

In sum, Weeks' claim, far from being one that a reasonable jurist in October, 1995 would have been "compelled" to sustain, is one that was (and is) contrary to an unbroken line of authority supporting the adequacy of the trial judge's response to the question posed by Weeks' jury. Indeed, the words of Judge Kozinski in his dissenting opinion in *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1103 (1998), go to the heart of the "new rule" matter:

> This is, so far as I know, the first case in Anglo-American jurisprudence to hold that a judge erred because he gave a jury instruction that is 100 percent correct. Whatever the merits of this rule – and I agree . . . that there is not much –

[8] Virtually without exception, these courts determined whether the trial court's answer to the jury's question constituted an abuse of discretion. None, then, regarded the adequacy of the trial court's response as implicating the Constitution. As the amicus brief from the Criminal Justice Legal Foundation so persuasively demonstrates (CJLF Br. 18-22), Weeks' claim should be regarded as nothing more than a non-constitutional matter relating to the trial court's handling of a procedural matter, an issue best left to the trial judge's discretion. Because habeas corpus lies only to remedy federal constitutional errors, *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), Weeks' claim cannot warrant collateral relief.

> such an extraordinary departure from established law may not be applied on collateral review. . . . A glimpse at the legal landscape reveals that never before has any court held that a judge must give a new supplemental instruction rather than refer the jury to the relevant, legally correct instructions already given. Not in 1989; not ever until today.

130 F.3d at 843-844 (Kozinski, J., dissenting).[9]

Even if Weeks somehow could satisfy the "new rule" doctrine, § 2254(d) nevertheless would bar the granting of relief upon his Eighth Amendment claim. This provision of AEDPA precludes federal habeas relief as to any claim adjudicated on the merits by the state court unless, in relevant part, such adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States . . . " The Fourth Circuit, the district court and the Magistrate Judge

[9] In *McDowell*, the Ninth Circuit held that the jury's question showed that 11 jurors "erroneously **believed**" that they could not consider substantial parts of the defendant's mitigation evidence, and this misapprehension thus required the trial judge to do something more than simply refer the jury to the instructions on mitigation. 130 F.3d at 837 (emphasis added). As the Ninth Circuit later made clear, however, in *United States v. Barrigan-Devis*, 133 F.3d 1287 (9th Cir. 1998), *McDowell* hinged on the fact that the jury's question reflected, not mere confusion, but an affirmative misunderstanding of the jury charge. 133 F.3d at 1290. Thus, even if it were correctly decided, *McDowell* would not speak to the issue in the present case. The question posed by Weeks' jury certainly did not manifest an affirmative misapprehension of the sentencing process rather than a mere request for clarification.

unanimously agreed that § 2254(d) bars federal collateral relief on Weeks' claim. (App. 342-346).

Weeks' arguments in this Court have been inconsistent as to what seminal case or line of authority decided by this Court supposedly constitute the "clearly established Federal law" for purposes of § 2254(d)(1).[10] In his certiorari petition, Weeks suggested that the state court's ruling on direct appeal contravened this Court's holding in *Bollenbach v. United States*, 362 U.S. 607, 612-613 (1946). (Pet. at 20-22). On brief, though, Weeks asserts that he "seeks only the obvious application of the pedestrian rule

[10] In a cursory footnote, Weeks suggests that the allegedly "perfunctory manner" of the Supreme Court of Virginia's disposition of his claim on direct appeal justifies *de novo* federal habeas review. (Pet. Br. at 14 n.9). If Weeks is arguing that § 2254(d) is not even applicable to the state court's ruling, no such contention was raised in his petition for certiorari. Weeks did not include as a question presented any argument that the Fourth Circuit erroneously had reviewed his Eighth Amendment claim under § 2254(d). On the contrary, Weeks acknowledged the applicability of § 2254(d) to the present claim by complaining only that the state court's "decision was contrary to and an unreasonable application of this Court's clearly established precedents. . . . " (Pet. at 20). *See Lockhart v. Fretwell*, 506 U.S. 364, 371 n.4 (1993). And, neither in his petition nor his opening brief did Weeks include § 2254(d) under the heading "statutory provisions involved." *See* Rule 24.1(f). Thus, pursuant to Rule 14.1(a), Weeks has not properly preserved any challenge to the applicability of § 2254(d)(1) to this case. *See also Jones v. United States*, 119 S.Ct. 2090, 2104 n.11 (1999); *Lambrix*, 520 U.S. at 527 n.1. *Cf. Trest v. Cain*, 522 U.S. 87, 90 (1997) (prisoner's certiorari petition raising issue of whether district court was **required** to raise sua sponte procedural default issue did not permit review of separate question whether district court was **permitted** to review default sua sponte).

that the sentencer in a capital trial might not deem itself precluded from considering relevant mitigating evidence." (Pet. Br. at 22 n.13).

The latter of these contentions must be rejected, regardless of whether it is viewed in the context of § 2254(d) or the "new rule" doctrine. This Court underscored this point in *Sawyer*, where it found unpersuasive the prisoner's claim that *Caldwell* had been "dictated by the principle of reliability in capital sentencing; the test would be meaningless if applied at this level of generality." 497 U.S. at 236. *See also Gray v. Netherland*, 518 U.S. 152, 169-170 (1996); *Taylor*, 508 U.S. at 343-344. Because the abstract right to present mitigating evidence and to have it considered by the jury simply does not speak with sufficient specificity to the entirely separate matter of the constitutionality of the trial judge's response to the jury's question, this Court's holdings in *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), hardly constitute the relevant "clearly established Federal law" for purposes of § 2254(d)(1). *See also Graham*, 506 U.S. at 902-903; *Sawyer*, 497 U.S. at 236; *Parks*, 494 U.S. at 490-491.

As for *Bollenbach*, if that decision established a constitutional principle that a trial court must respond to a jury's request for supplemental instructions in some prescribed manner and may not simply refer the jury to the original charge, such has been remarkably unrecognized by the courts of appeals.[11] In *Bollenbach*, the defendant

[11] Indeed, some courts have alluded to *Bollenbach* at the very same time that they cited the settled principle that a trial court has broad discretion in determining how to respond to a jury's request for further instructions. *See, e.g., United States v.*

was tried for transporting securities in interstate commerce knowing they had been stolen and for conspiracy to commit that offense. After deliberating seven hours and stating that it was "hopelessly deadlocked," the jury then asked a question that "clearly indicated that the jurors were confused concerning" whether evidence on the substantive charge also constituted proof on the conspiracy count. 326 U.S. at 612. The trial judge responded with an answer that this Court characterized as "palpably erroneous" and "manifest . . . misdirection." *Id.* at 611, 614. This Court concluded that, by its misinformation, the trial court had not discharged its duty to respond to the jury's "explicit . . . difficulties . . . with concrete accuracy." 326 U.S. at 612-613.

Weeks makes no claim that the trial judge's answer to the jury's question was inaccurate or even misleading, but only that it did not go far enough. Inasmuch as *Bollenbach* addressed an entirely separate matter and did "not answer the definitive question" posed by Weeks, *see Lambrix*, 520 U.S. at 528 n.3, then certainly under § 2254(d)(1) a state court reasonably could have regarded *Bollenbach* as readily distinguishable from the present case – even if, unlike in Weeks' case, the claim actually had been raised and *Bollenbach* actually cited to the state court.

Dorri, 15 F.3d at 892; *United States v. Laing*, 889 F.2d at 290; *United States v. Ladd*, 885 F.2d at 961.

III. THE TRIAL COURT PROPERLY ANSWERED THE JURY'S QUESTION ABOUT ITS SENTENCING ALTERNATIVES, AND THERE IS NO REASONABLE LIKELIHOOD THAT THE JURY BELIEVED IT WAS PRECLUDED FROM CONSIDERING THE MITIGATION EVIDENCE.

The record in this case establishes both that the trial court's answer to the jury's question was not unconstitutional and that the jury was not precluded from considering Weeks' mitigation evidence. First, the multitude of courts of appeals opinions analyzing comparable claims under an abuse of discretion standard demonstrate the essentially non-constitutional nature of Weeks' claim. (See pages 35-36 n.8). Moreover, putting aside its entirely dissimilar facts, *Bollenbach* did not invoke the Constitution in holding that the trial judge had not discharged his duty "to give the jury the required guidance by a lucid statement of the relevant legal criteria." 326 U.S. at 612. *Bollenbach* was a direct appeal case "that raised an important question in the administration of federal criminal justice," and merely held that, in light of the trial judge's "bad law," the defendant had been improperly convicted under the federal indictments. 326 U.S. at 609, 614.

The trial judge in Weeks' case, far from acting unconstitutionally, properly exercised his discretion by directing the jury's attention to the very instruction that made clear its obligation to consider the mitigating evidence and its option to impose a life sentence even if it found the existence of one or both aggravating circumstances. In this regard, courts have recognized that typically the most prudent, least risky response that a trial judge can

provide to a jury's inquiry is to have it reread the original, legally accurate, instructions. *See, e.g., United States v. Smith*, 104 F.3d at 149 (trial court did not abuse discretion in referring jury to two instructions in original charge, rather than "risk confusion with another, slightly different instruction"). *See also United States v. Stowell*, 947 F.2d at 1257 (because "[q]uestions posed by a jury are often susceptible of different meanings," trial judge did "nothing wrong in responding in a narrow fashion"). Indeed, it is not unusual for a **defendant** to object to the trial court giving a supplemental instruction, rather than simply referring to the original charge. *See, e.g., United States v. Ellis*, 23 F.3d 1268, 1273-1274 (7th Cir. 1994); *United States v. James*, 998 F.2d 74, 78 (2d Cir. 1993); *United States v. Caro*, 965 F.2d at 1554-1555. And, the substantial risks inherent in a trial court's effort to "improve upon" a concededly valid jury charge may be seen in the recurring challenges to instructions attempting to define the concept of reasonable doubt. *See, e.g., Victor v. Nebraska*, 511 U.S. 1 (1994); *Cage v. Louisiana*, 498 U.S. 39 (1990).

Of course, the trial judge's response to the question posed by Weeks' jury cannot warrant federal collateral relief if, in the end, the jury considered his mitigating evidence before imposing the death sentence. It is abundantly clear, however, that the jury did not disregard Weeks' extensive mitigating evidence. Indeed, it plainly **relied upon such evidence** in finding that he was not a future danger, even though it ultimately concluded that he deserved the death penalty.

In *Boyde v. California*, 494 U.S. 370 (1990), this Court held, as to claims that the jury might have misapplied ambiguous jury instructions, "the proper inquiry . . . is

whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. [A defendant does not make out an Eighth Amendment violation] if there is only a possibility of such an inhibition." 494 U.S. at 380. *See also Jones v. United States*, 119 S.Ct. at 2102-2103; *Estelle v. McGuire*, 502 U.S. 62, 70-75 (1991). The record in this case, when considered against the facts in *Boyde* and *Buchanan*, plainly establishes that there was no possibility, much less a reasonable likelihood, that the jury misapprehended its sentencing alternatives.

From start to finish, the trial judge, prosecutors, and defense counsel repeatedly made clear to the jury that a death sentence under no circumstances was mandatory, that a life sentence always was an option, and that the jury had to consider any mitigating evidence offered by Weeks. For example, during voir dire, the prosecutor first informed the prospective jurors that, in the event Weeks was convicted of capital murder, they would have two sentencing options in the penalty phase and then inquired about their ability fairly to consider all sentencing evidence as well as the two possible punishments. (App. 18-20, 22-24, 29-30, 34-35, 39, 45, 51-53, 60-61). Defense counsel then carefully explained to the venire the concept of mitigation and examined the panels concerning their willingness to consider the defense's mitigating evidence. (App. 21-22, 26, 31-32, 36-37, 41-42, 47-49, 56-58, 63-65).

The parties' opening statements in the penalty phase were of the same stripe. The Commonwealth's Attorney reminded the jurors of the oath that they had taken and

the fact that they would "consider certain evidence now, as well as the evidence that you have heard, and determine what is the appropriate sentence . . . " (App. 85). The prosecutor further stated that after the jurors had "heard **all of the evidence, to weigh it carefully**" and to impose a death sentence "in accordance with law and in accordance with the evidence." (Oct. 21, 1993, Tr. 11-12, emphasis added). In his own opening statement, defense counsel reiterated the sentencing options of death and life imprisonment and then, referring to the mitigating evidence that he would present, stated that "you as the jury **will have to consider this**." (App. 87, emphasis added).

After the Commonwealth introduced its aggravating evidence, the defense, virtually without objection, presented Weeks and nine other witnesses, who described in great detail such matters as Weeks' upbringing, accomplishments and positive behavior until about the time of his high school graduation, his subsequent criminal conduct, and the events surrounding the murder of Trooper Cavazos. (App. 104-175). This evidence, if credited by the jury, tended to show that for most of his life Weeks had overcome socio-economic and personal obstacles and led a productive life, had a relatively minor criminal record, and, perhaps, had acted out of character when he murdered Trooper Cavazos.

In its jury charge, the trial court gave Instruction No. 2, which was virtually identical to the instruction that this Court upheld in *Buchanan*. 522 U.S. at 277 n.4. The instruction informed the jury that, if it unanimously found beyond a reasonable doubt at least one of the statutory aggravators, "then you **may** fix the punishment of the defendant at death or if you believe **from all the**

evidence that the death penalty is not justified, then you **shall** fix the punishment of the defendant at life imprisonment. . . . " (App. 192, emphasis added). The instruction further recited that if the Commonwealth did not prove at least one aggravating predicate beyond a reasonable doubt, then the jury "shall fix the punishment of the defendant at life imprisonment. . . . " (App. 193).

Additionally, the trial court gave an instruction submitted by Weeks that specifically defined, and gave examples of, mitigating evidence. (App. 195). The examples included Weeks' "age, character, education, environment, life and background, or any aspect of the crime itself which might be considered extenuating"; the defense's evidence touched on all of these matters. (*Id.*). The instruction specifically stated, in part: "You **must consider a mitigating circumstance** if you find there is evidence to support it." (*Id.*, emphasis added).

Then, during his closing argument, the Commonwealth's Attorney referred to the mitigating evidence that Weeks had presented and said that if Weeks had testified truthfully in his own behalf, "perhaps a life sentence would be appropriate." (App. 202). The prosecutor also "**ask[ed** the jury] to impose the most serious penalty that the law **allows**, for this most serious of crimes." (App. 207, emphasis added).

Defense counsel's own closing argument again made clear that the jury had to choose between the two sentencing alternatives. Then, Weeks' attorney inadvertently asserted that the prosecution had to prove both aggravating factors before the jury could impose a death sentence; upon the Commonwealth's prompt objection,

defense counsel acknowledged that the prosecution had to prove one aggravating circumstance, not both, in order to permit a death sentence. (App. 212). Of particular significance, defense counsel then stated: "**Now, you could still find that he meets both of these [aggravating] criterias [*sic*], and not sentence him to death. I believe you will read that in the instructions.**" (*Id.*, emphasis added). Finally, defense counsel, alluding to the instruction reciting some of the mitigating evidence that the jury could consider, asked it to impose a life sentence. (App. 213).

In rebuttal, the Commonwealth's Attorney expressly acknowledged that the jury did not "have to impose [the death penalty], but all of you have taken an oath that you can consider both options." (App. 214). And, the prosecutor repeated his earlier statement that if the jury credited Weeks' penalty-phase testimony, then it should "sentence him to life." (App. 215).

After beginning its deliberations at approximately 10:40 a.m. on the second day of the penalty phase, the jury at 3:15 p.m. submitted the following question:

> If we believe that Lonnie Weeks, Jr., is guilty of at least 1 of the alternatives, then is it our duty as a jury to *issue* the death penalty? or must we *decide* (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify.

(App. 217, 219, 222, emphasis in original). The trial judge answered the jury's question thusly: "See second paragraph of Instruction #2 (Beginning with 'if you find from. . . . ')." (App. 223). The trial judge reasoned that his response "answers their precise question. I think they just have to be drawn to that paragraph to find their answer." (App. 224).

The jury resumed its deliberations and never submitted any follow-up questions. Instead, **more than two hours later**, it returned with its verdict at 5:31 p.m., and sentenced Weeks to death based solely upon the "vileness" predicate. (App. 224-225). The jury thus specifically rejected "future dangerousness" as a second ground for imposing the death penalty. The jury's verdict, moreover, expressly stated that it "had considered the evidence in mitigation of the offense. . . . " (App. 225). Finally, when polled by the trial judge, all members of the jury assented to the verdict. (App. 225-226).

This Court's decision in *Buchanan* demonstrates that Weeks cannot satisfy the *Boyde* "reasonable likelihood" test. In *Buchanan*, this Court held that the Eighth Amendment had not required the trial court to instruct the capital jury about the concept of mitigating evidence or particular statutory mitigating factors. The Court also concluded that there was no reasonable likelihood under *Boyde* that the jury would have understood the instructions to preclude its consideration of Buchanan's mitigating evidence. 522 U.S. at 279.

In this regard, the Court emphasized "the entire context in which the instructions were given" and concluded that the parties' express references to mitigating evidence in their opening statements and closing arguments in the penalty phase, Buchanan's presentation of seven mitigation witnesses, and the jury's statement in the verdict that it had considered the mitigating evidence demonstrated

that the jury had not disregarded Buchanan's "extensive testimony in making its decision. . . . " 522 U.S. at 270-273, 278-279. Moreover, this Court ruled that an instruction substantially identical to Instruction No. 2 in Weeks' case clearly explained the jury's duty to take into account all the evidence and to consider imposing a life sentence even if it found the existence of one or both of the statutory aggravating circumstances. 522 U.S. at 277 n.4.[12]

All of the circumstances that the Court stressed in *Buchanan* as a basis for rejecting the prisoner's Eighth Amendment claim exist here as well. Indeed, one of the few differences between the two cases is that Weeks' jury specifically was instructed on the concept of mitigating evidence and was expressly directed that it "must consider" the defense's mitigating evidence. (App. 195). Consequently, if no reasonable likelihood existed in *Buchanan* that the jury believed it was precluded from considering

---

[12] This Court also has canvassed the trial record in other cases involving allegedly ambiguous jury instructions. In *Boyde* itself, the Court found that a particular mitigating circumstance sufficed to ensure that the jury would consider the defendant's evidence of his background and character, particularly in light of the fact that the defendant had presented (without objection) substantial mitigating evidence and that both the prosecutor's and defense counsel's arguments had confirmed the relevance of the defendant's mitigating evidence. 494 U.S. at 381-386. *See also Jones v. United States*, 119 S.Ct. at 2100-2110 (overall jury charge and verdict forms removed any potential confusion concerning effect of jury's inability to reach unanimous sentence recommendation, and prosecutor's arguments "made absolutely clear" meaning of non-statutory aggravating factors and cured any potential overbreadth or vagueness infirmity.).

the defendant's mitigating evidence, the same conclusion necessarily obtains here as well.

The mere fact that Weeks' jury, unlike the jury in *Buchanan*, asked the trial court a question about the sentencing process and was not given the supplemental instruction Weeks requested certainly is insufficient to demonstrate an Eighth Amendment violation. As the many courts of appeals decisions cited by respondent reflect, juries often ask questions seeking elaboration upon concededly valid instructions. The fact that juries ask such questions shows, not so much their confusion over the original instructions, but their conscientious attempt to discharge their duties. *See United States v. Barr*, 963 F.2d 641, 651 (3rd Cir. 1992); *United States v. Bi-Co Pavers, Inc.*, 741 F.2d 730, 735 (5th Cir. 1984).

Consistent with these principles, there can be no doubt that Weeks' death sentence is constitutional. First, the trial judge discharged any conceivable duty allegedly owed to Weeks under *Bollenbach* by specifically referring the jury to the very instruction that accurately answered its question. The jury, of course, was presumed to follow the court's instructions. *See Jones*, 119 S.Ct. at 2105. The constitutional validity of Weeks' death sentence is reflected by the fact that the jury deliberated for more than two additional hours without asking further questions,[13] and then returned a verdict that expressly stated that it had considered the mitigating evidence. As both

---

[13] In *Bollenbach*, this Court emphasized the fact that, after deliberating for seven hours, the jury had rendered a guilty verdict only five minutes after its "inquiry was answered by an untenable legal proposition." 326 U.S. at 614.

the district court and Magistrate Judge aptly noted, it is all the more telling that the jurors, who had promised on voir dire to ask for clarification of any instruction they did not understand, found it unnecessary to ask follow-up questions before reaching their verdict. *See Weeks*, 4 F. Supp. 2d at 536; Magistrate's Report at 110. *See also United States v. Stowell*, 947 F.2d at 1257 (if "jury needed further help it could have asked another question").

The prosecution, moreover, sought the death penalty based on both the "future dangerousness" and "vileness" predicates. The fact that the jury based its death sentence solely upon the "vileness" factor clearly shows not only that it considered, but also that it gave effect to, Weeks' mitigating evidence. Much of Weeks' mitigating evidence had nothing to do with the circumstances surrounding the murder of Trooper Cavazos but, rather, with such matters as his upbringing, positive accomplishments, and criminal record. During closing argument, both parties discussed this mitigating evidence in detail, plainly in an attempt to persuade the jury that Weeks was, or was not, a future danger. (App. 204-216). The only reasonable explanation for the jury's rejection of the "future dangerousness" predicate is that it not only considered his mitigating evidence concerning his background and character, but found it persuasive.[14]

---

[14] In his certiorari petition, Weeks did not contest the fact that the jury considered his mitigating evidence, at least for purposes of deciding the future dangerousness issue. (Pet. at 11 n.3, 12 n.4). That being the case, the several decisions of this Court holding that Texas' statutory scheme is constitutional, because its "future dangerousness" special issue provides a jury with the means to consider the defendant's mitigating evidence, likewise support the constitutionality of Weeks' death sentence. *See Johnson v. Texas*, 509 U.S. 350 (1993); *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262 (1976).

Weeks is the petitioner-appellant in this secondary, disfavored collateral action. *See generally Calderon v. Thompson*, 118 S.Ct. 1489, 1500-1501 (1998). He simply is not entitled to federal habeas relief on the basis of implausible speculation about the reasons for the jury's question or the impact of the trial judge's response on its deliberations. *See Boyde*, 494 U.S. at 380 ("there is a . . . strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation"). *See also Jones*, 119 S.Ct. at 2105 ("Where the effect of [the jury's alleged confusion regarding the consequences of any deadlock is] so uncertain, [the] defendant cannot meet his burden of showing that the error actually affected his substantial rights"); *Romano*, 512 U.S. at 13-14 (inasmuch as jury's knowledge in defendant's second capital murder trial of his death sentence in first trial made it equally plausible that jurors would be more or less inclined to impose additional death sentence, relief "would thus be an exercise in speculation, rather than reasoned judgment"). This Court, then, must reject Weeks' highly improbable conjecture that the jury somehow might have concluded that it could not consider his mitigation evidence.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

RONALD J. ANGELONE, Director
Virginia Department of Corrections

MARK L. EARLEY
Attorney General of Virginia
ROBERT H. ANDERSON, III
Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219



REPLY

BRIEF

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

CASES:

Buchanan v. Angelone, 522 U.S. 269, 118 S.Ct. 757 (1998) 2

California v. Brown, 479 U.S. 538 (1987) 5, 7

Eddings v. Oklahoma, 455 U.S. 104 (1982) 1, 2, 3

Harris v. Reed, 489 U.S. 255 (1989) 8

James v. Kentucky, 466 U.S. 341 (1984) 8

Lockett v. Ohio, 438 U.S. 586 (1978) 1, 2, 3

Penry v. Lynaugh, 492 U.S. 302 (1989) 1, 2, 3, 4, 7

Teague v. Lane, 489 U.S. 288 (1989) 1

Woodson v. North Carolina, 428 U.S. 280 (1976) 4, 7

Ylst v. Nunnemaker, 501 U.S. 797 (1991) 8

STATUTES:

28 U.S.C. Section 2254(d) 1

ARGUMENT

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), this Court "held that 'just as the State may not by statute preclude the sentencer from considering any mitigating factor, *neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.*' " *Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (quoting *Eddings*, 455 U.S. at 113-114) (emphasis added). At the time of Mr. Weeks' trial in 1993, this "sentencer may not refuse to consider mitigation" rule was "not a 'new rule' under *Teague [v. Lane*, 489 U.S. 288 (1989)] because it [was] dictated by *Eddings* and *Lockett [v. Ohio*, 438 U.S. 586 (1978)]." *Id.*, 492 U.S. at 319 (Penry's judgment was final for *Teague* purposes in 1986). In 1993, then, it would have been unreasonable (and contrary to Supreme Court law) for a court to find no " 'risk that the death penalty [was] imposed in spite of factors which may call for a less severe penalty,' " *Penry*, 492 U.S. at 328 (quoting *Lockett*, 438 U.S. at 605, and *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring)), in the face of a sentencer's suggestion that " 'in following the law . . . [it could not] consider,' " *Eddings*, 455 U.S. at 879 (O'Connor, J., concurring) (quoting sentencing judges' comments), mitigating evidence.[1] Trial counsel for Mr.

---

[1] As for the Respondent's professed inability to discern "what seminal case or line of authority decided by this Court supposedly constitute [sic] the 'clearly established Federal law' [that satisfies *Teague v. Lane*, 489 U.S. 288 (1989) and Section 2254(d)]," Brief of Respondent, p. 34, the case that Mr. Weeks cited to the trial court and the Virginia Supreme Court – *Penry* – is as good a representative as any of the "pedestrian rule that the sentencer in a capital case may not deem itself precluded from considering relevant mitigating evidence." *See* Brief of Petitioner at 27, n. 13; *see also id.* at 21-22 (line of cases).

Weeks were concerned that the sentencers in his case would *apply* Instruction No. 2 (J.A. 192-93),[2] in a way that violated the *Lockett*, *Eddings*, and *Penry* rule. Counsel stated that "it is not clear to the jury [from Instruction No. 2] that, if they find beyond a reasonable doubt that the aggravating factors have been proved, that they can still choose to sentence the defendant to life in prison." (J.A. 179). To satisfy the Eighth Amendment, said counsel, "the jury has to be instructed that, even if they find the aggravating factors beyond a reasonable doubt, that they have to be instructed that they still can give effect to the evidence in mitigation." (J.A. 178). Counsel told the trial court that the authority for this request was "*Penry v. Linowe* (phonetic) 492 U.S. 302." *Id.*[3] The trial court refused to instruct the jurors according to counsel's *Penry* request, and instead used Instruction No. 2.

The sentencers deliberated, and then returned with a question: if they believed that an aggravating circumstance existed, "then is it our duty to issue the death penalty?"[4] This understanding of their duty would

---

[2] This is the instruction later reviewed by this Court in *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757 (1998).

[3] The cite for *Penry v. Lynaugh* is 492 U.S 302 (1989). Counsel also explained that the sentencing forms which the jurors had to review and fill out were deficient "when it comes to giving effect to mitigation" (J.A. 179) in that they did "not expressly provide for a sentence of life imprisonment, upon finding beyond a reasonable doubt, on one or both of the aggravating factors." (J.A. 186). Counsel argued that this violated "*Henry v. Linum (sic).*" *Id.*

[4] Respondent argues that a string of occurrences at trial – questions and statements made by the lawyers during voir dire and in closing arguments, the nature and quality of the evidence

plainly violate *Lockett*, *Eddings*, and *Penry*. Counsel asked the trial court accurately to inform the sentencers that even if an aggravating circumstance was found, "they still may impose a life sentence" (J.A. 223), which was the same instruction counsel had earlier requested, based upon *Penry*. The Court refused.

On direct appeal, Mr. Weeks asked that the Virginia Supreme Court reverse the trial court's a.) refusal to instruct the jurors before deliberations that they could give effect to mitigation even if they found an aggravating circumstance, and b.) failure to correct the jurors' mis-impression, revealed during deliberations, that they were required to impose the death penalty upon a finding of aggravation. Respondent argues that Mr. Weeks' claim is defaulted because it was not fairly presented to the Virginia Supreme Court. *See* Brief of Respondent, pp. 21-26. Respondent's arguments ought to be rejected.

---

presented, instructions by the trial judge other than the pattern jury instruction upheld in *Buchanan* and relied upon by the Fourth Circuit below in rejecting Mr. Weeks' claim – demonstrate that no sensate jury at Mr. Weeks' trial could possibly have been left sufficiently in the dark to have asked the trial judge the question that Mr. Weeks' jury *did* ask about whether it could or could not consider mitigating evidence after it found an aggravating circumstance. But *all of these* occurrences preceded the jury's asking of the question; the jury undeniably *did* ask the question; and the trial judge's sole answer was to tell the jurors to reread "the second paragraph of Instruction # 2" (J.A. 222) – the pattern instruction involved in *Buchanan*. Everything in Point III of the Brief of Respondent that disregards these realities – and that is almost all of Point III – is quite beside the point.

The following excerpts from the direct appeal record show what Mr. Weeks presented to the Virginia Supreme Court:

ASSIGNMENTS OF ERROR AND
DESIGNATION OF RECORD

. . . .

41. The trial court erred by refusing to give the jury defendant's proposed instruction C1[5] or to otherwise fully and properly instruct the jury regarding their option to give effect to mitigating evidence by sentencing the defendant to life in prison even if they found one or all of the statutory aggravating factors beyond a reasonable doubt . . .

(J.A. 237).

[BRIEF ON DIRECT APPEAL]

41st Assigned Error

In a capital murder case, consideration of the character and record of the individual offender is indispensable in meeting the requirements of the Eighth Amendment. *Woodson v. North Carlina,* [428 U.S. 280 (1976)] *supra.* In *Penry v. Lynaugh* the Supreme Court stated that " . . . it is precisely because the punishment should be directly related to the personal culpability of the defendat [sic] that the jury must

---

[5] Proposed instruction C1 reads as follows:

Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison.

(J.A. 190).

be allowed to consider and *give effect to* mitigation evidence relevant to a defendant's character or record or the circumstances of the offense." 492 U.S. 302, 327-328, 106 L.Ed.2d 256, 109 S.Ct 2943 (1989) (emphasis added). The Court further stated, " . . . in the absence of instructions informing the jury that it could consider *and give effect to mitigating evidence . . . by declining to impose the death penalty,* we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to the evidence in rendering its sentencing decision. *Id.,* (emphasis added), quoting *California v. Brown,* 479 U.S. 538, 545, 93 L.Ed. 2d 934, 101 S.Ct. 837 (1987) (O'Connor, J., concurring).

Instruction C1 was a correct statement of the law under Penry, was not needlessly redundant, and was materially vital to the defendant; it should therefore have been given to the jury by the court.

(J.A. 243-243).

ASSIGNMENTS OF ERROR AND
DESIGNATION OF THE RECORD

44. The trial court erred in refusing, in response to a specific jury request for clarification, to specifically instruct the jury that if they found one or more aggravating factors beyond a reasonable doubt, they could sentence the defendant to life in prison or to death.

(J.A. 238).

[APPELLANTS BRIEF ON DIRECT APPEAL]

44th Assigned Error

[Statement of Facts]

Regarding assigned error 44, during their deliberations in the penalty phase of the trial,

the jury sent out a written question asking the court to "clarify" whether or not they had a "duty" to impose the death penalty if they found one of the aggravating factors beyond a reasonable doubt, or whether they could choose between the death penalty and a life sentence. *Appendix*, 896, 2717-2718. The court refused the defendant's request that the jury be instructed that they could impose a life sentence even if they found one or both of the aggravating factors beyond a reasonable doubt. *Appendix*, 2718-2719, instead instructing them to reread the second paragraph of the finding instruction. *Id.*

(J.A. 265-266).

44th Assigned Error

The defendant relies upon the argument set forth under the *41st Assigned Error, supra*, in response to the question presented on this error.

(J.A. 245).

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, sections 8, 9 and 11 of the Constitution of Virginia.

(J.A. 245-246).

In response to these facts, assignments of error, and briefs, the Virginia Supreme Court held as follows:

On appeal, defendant assigns 47 alleged errors committed by the trial court. The defendant has not briefed or argued ten of those assigned errors (Nos. 4, 5, 6, 7, 8, 17, 26, 31, 38, and 39); hence, we will not consider them. *Jenkins v. Commonwealth*, 244 Va. 445, 451, 423 S.E.2d 360, 364 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct 1862, 123 L.Ed. 2d 483 (1993).[6] In addition, defendant effectively presents no argument in support of five of those alleged errors (Nos. 16, 34, 44, 45, and 46). . . . We have *considered* these so-called arguments and *find no merit* in any of them.

(J.A. 275) (emphasis added).[7]

In conclusion, defendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. *We have considered all the arguments* in support of those issues and conclude that *none has any merit*.

(J.A. 292) (emphasis added).

Thus, Mr. Weeks advised the Virginia Supreme Court that the Eighth Amendment was violated because his capital sentencers believed that they could not consider mitigating circumstances upon finding aggravation. He asked that this constitutional violation be corrected on the basis of *Woodson*, *Penry*, and *Brown*, *supra*, and the Virginia Supreme Court "considered all the arguments in

---

[6] The Virginia Supreme Court "defaulted" other issues as well. (J.A. 287, 288).

[7] Respondent urged the Virginia Supreme Court to find that assignment of error 44 was defaulted: "Weeks effectively presents no argument in support of Assignment[ ] of Error . . . 44 . . . Accordingly, he has defaulted on th[is] issue." Brief of the Commonwealth, *Weeks v. Virginia*, No. 940335, p. 16, n.3. The Virginia Supreme Court, by "considering" and "find[ing] no merit" to assignment of error 44, obviously rejected Respondent's default argument. Respondent presented no argument at all regarding assignment of error number 44 on direct appeal.

support of those [and other] issues and conclude[d] that *none has any merit*." (J.A. 292) (emphasis added).[8] There was no procedural default, *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) ("If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal review that might otherwise be available."); *Harris v. Reed*, 489 U.S 255, 262 (1989), and Mr. Weeks' presentation to the Virginia Supreme Court was perfectly sufficient to identify his contention and the specific rule of federal constitutional law on which it rested. *James v. Kentucky*, 466 U.S. 341, 351 (1984) ("inescapable that the defendant sought to invoke the substance of his federal right").

[8] Respondent's argument that on direct appeal Petitioner "did not present the claim at all, fairly or otherwise," Brief of Respondent, p. 23, cannot be reconciled with this record.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the lower court and vacate Petitioner's sentence of death.

Respectfully submitted,

Sterling H. Weaver, Sr., Esq.
P.O. Box 543
Portsmouth, VA 23705
(757) 393-0237

Mark Evan Olive, Esq.
Law Offices of
Mark E. Olive, P.A.
320 W. Jefferson Street
Tallahassee, FL 32301
(850) 224-0004

Glen A. Huff, Esq.
Timothy M. Richardson, Esq.
Counsel of Record
Huff, Poole & Mahoney, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
(757) 499-1841

Counsel for Petitioner

Supreme Court, U.S.
FILED
NOV 15 1999
CLERK

No. 99-5746

IN THE

Supreme Court of the United States

LONNIE WEEKS, JR.,

Petitioner,

vs.

RONALD ANGELONE, DIRECTOR,
Virginia Department of Corrections,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Attorney of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

RECEIVED
NOV 17 1999
OFFICE OE THE CLERK
SUPREME COURT, U.S.

BEST AVAILABLE COPY

QUESTIONS PRESENTED

In the penalty phase of a capital case (1) the trial judge gave a correct instruction which explained that the death sentence was not mandatory and that defendant's mitigating evidence must be considered, (2) a question from the jury indicated one or more jurors did not understand, and (3) after giving defense counsel notice and an opportunity to be heard, the trial judge determined that the best clarification under the circumstances was to pinpoint the instruction and paragraph that answered the jury's question:

1. Is responding to the question in this manner within the trial judge's discretion?

2. Would a negative answer to Question 1 be a "new rule" within the meaning of *Teague* v. *Lane*?

3. Is a negative answer to Question 1 "clearly established Federal law, as determined by" this Court, within the meaning of 28 U. S. C. § 2254(d)(1)?

4. Is Question 1 a federal constitutional question at all?

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 3

Argument 4

I

The trial judge has the discretion to answer a jury question by referring them to a previously given, correct, pertinent instruction, under well-established practice 5

II

Nothing in existing Eighth Amendment precedents alters the rule of the trial judge's discretion in these matters 9

III

Petitioner's proposed rule is neither "dictated by precedent" nor "clearly established" 14

A. Applicability of the AEDPA 14

B. Rules and applications 16

IV

The trial judge's exercise of discretion on this point should not be considered a federal constitutional question 18

Conclusion 22

TABLE OF AUTHORITIES

Cases

Beck v. Alabama, 447 U. S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980) 9

Bollenbach v. United States, 326 U. S. 607, 90 L. Ed. 350, 66 S. Ct. 402 (1946) 5, 6

Boothe v. People, 814 P. 2d 372 (Colo. 1991) 6

Boyde v. California, 494 U. S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990) 13

Buchanan v. Angelone, 522 U. S. 269, 139 L. Ed. 2d 702, 118 S. Ct. 757 (1998) 2, 8, 21

Calderon v. Coleman, 525 U. S. 141, 142 L. Ed. 2d 521, 119 S. Ct. 500 (1998) 19

Caldwell v. Mississippi, 472 U. S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985) 17

California v. Ramos, 463 U. S. 992, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983) 19

Caspari v. Bohlen, 510 U. S. 383, 127 L. Ed. 2d 236, 114 S. Ct. 948 (1994) 4, 5

Castille v. Peoples, 489 U. S. 346, 130 L. Ed. 2d 380, 109 S. Ct. 1056 (1989) 15

Cohens v. Virginia, 6 Wheat. (19 U. S.) 264, 5 L. Ed. 257 (1821) 6

Coleman v. Calderon, 150 F. 3d 1105 (CA9 1998) 19

Eddings v. Oklahoma, 455 U. S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982) 12, 17

Elledge v. Florida, 142 L. Ed. 2d 303, 119 S. Ct. 366 (1998) 20

Espinoza v. Florida, 505 U. S. 1079, 120 L. Ed. 2d 854, 112 S. Ct. 926 (1992) 20

Estelle v. McGuire, 502 U. S. 62, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991) 13

Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) 18, 19, 21

Gardner v. Florida, 430 U. S. 349, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977) 11

Hitchcock v. Dugger, 481 U. S. 393, 95 L. Ed. 2d 347, 107 S. Ct. 1821 (1987) 20

Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. Ed. 828, 28 S. Ct. 529 (1908) 21

Jackson v. Virginia, 443 U. S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) 16

Lackey v. Texas, 514 U. S. 1045, 131 L. Ed. 2d 304, 115 S. Ct. 1421 (1995) 20

Lambrix v. Singletary, 520 U. S. 518, 137 L. Ed. 2d 771, 117 S. Ct. 1517 (1997) 4, 20

Lewis v. Jeffers, 497 U. S. 764, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990) 19

Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) 17, 20

Lowenfield v. Phelps, 484 U. S. 231, 98 L. Ed. 2d 568, 108 S. Ct. 546 (1988) 21

McDowell v. Calderon, 130 F. 3d 833 (CA9 1997) ... 8, 12

Mills v. Maryland, 486 U. S. 367, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988) 12, 17

Monge v. California, 524 U. S. 721, 141 L. Ed. 2d 615, 118 S. Ct. 2246 (1998) 11

Morgan v. Illinois, 504 U. S. 719, 119 L. Ed. 2d 492, 112 S. Ct. 2222 (1992) 20

Mu'Min v. Virginia, 500 U. S. 415, 114 L. Ed. 2d 493, 111 S. Ct. 1899 (1991) 12

Neelley v. Nagle, 138 F. 3d 917 (CA11 1998) 18

Nichols v. United States, 511 U. S. 738, 128 L. Ed. 2d 745, 114 S. Ct. 1921 (1994) 12

Parke v. Raley, 506 U. S. 20, 121 L. Ed. 2d 391, 113 S. Ct. 517 (1992) 18

Penry v. Lynaugh, 492 U. S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989) 21

People v. Beardslee, 53 Cal. 3d 68, 279 Cal. Rptr. 276, 806 P. 2d 1311 (1991) 7

People v. Davis, 10 Cal. 4th 463, 41 Cal. Rptr. 2d 826, 896 P. 2d 119 (1995) 6

Rupe v. Wood, 93 F. 3d 1434 (CA9 1996) 19

Sawyer v. Smith, 497 U. S. 227, 111 L. Ed. 2d 193, 110 S. Ct. 2822 (1990) 15, 16, 17

Sawyer v. Whitley, 505 U. S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) 10

Schlup v. Delo, 513 U. S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995) 10, 11

Spencer v. Texas, 385 U. S. 554, 17 L. Ed. 2d 606, 87 S. Ct. 648 (1967) 18

State v. Dedrick, 607 A. 2d 127 (N.H. 1992) 6, 9, 10

State v. Neujahr, 540 N. W. 2d 566 (Neb. 1995) 6

Steel Co. v. Citizens for a Better Environment, 523 U. S. 83, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998) 4

Stone v. Powell, 428 U. S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976) 15

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) 4, 16, 17

Thompson v. Keohane, 516 U. S. 99, 133 L. Ed. 2d 383, 116 S. Ct. 457 (1995) 16

Turner v. Murray, 476 U. S. 28, 90 L. Ed. 2d 27, 106 S. Ct. 1683 (1986) 12

United States v. Nunez, 889 F. 2d 1564 (CA6 1989) 8

United States v. Scheffer, 523 U. S. 303, 140 L. Ed. 2d 413, 118 S. Ct. 1261 (1998) 19

United States v. Smith, 104 F. 3d 145 (CA8 1991) 6

United States v. Span, 170 F. 3d 798 (CA7 1999) 6, 7

United States v. Walker, 575 F. 2d 209 (CA9 1978) 7

United States v. Warren, 984 F. 2d 325 (CA9 1993) 8

Walton v. Arizona, 497 U. S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990) 11

Weeks v. Angelone, 176 F. 3d 249 (CA4 1999) 14

Weeks v. Commonwealth, 450 S. E. 2d 379 (Va. 1994) 2, 10

Williams v. New York, 337 U. S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949) 11

Woodson v. North Carolina, 428 U. S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) 9

Wright v. West, 505 U. S. 277, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992) 16, 17

United States Statutes

28 U. S. C. § 2254(d) 3, 9, 14

28 U. S. C. § 2254(d)(1) 14, 18

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218 (1996) 14

State Statutes

Va. Code Ann. § 18.2-31 21

Va. Code Ann. § 19.2-264.2 21

Va. Code Ann. § 19.2-264.4(B) 21

Treatise

2 C. Wright, Federal Practice and Procedure—Criminal (2d ed. 1982) 7

Miscellaneous

Cal. Standards of Judicial Administration 7

K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform (1995) 20

Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95 (1987) 19

Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998) 4, 15, 16

IN THE

Supreme Court of the United States

LONNIE WEEKS, JR.,

Petitioner,

vs.

RONALD ANGELONE, DIRECTOR,
Virginia Department of Corrections,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves a claim that the trial court violated the Constitution of the United States by referring the jury, in

---

1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

answer to a question, to a previously given, correct, pertinent instruction. Not only that, but the claim asserts that this rule is established law, so that all cases with this "error" are subject to collateral attack, no matter how long the judgments have been final. A decision overturning large numbers of final judgments which were entered in accordance with well-established practices would be contrary to the interests of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On February 24, 1993, Virginia State Trooper Jose M. Cavazos stopped a car speeding down Interstate Route 95. Defendant Lonnie Weeks, a passenger, got out of the car at the officer's direction. Weeks then fired six shots, killing Trooper Cavazos. The officer's gun was still strapped in its holster. Weeks had stolen the car in the course of a household burglary. *Weeks* v. *Commonwealth*, 450 S. E. 2d 379, 382-383 (Va. 1994). There is no dispute on guilt of the offense. See Brief for Petitioner 2.

In the penalty phase, the trial judge instructed the jury with the standard instruction, subsequently upheld as correct in *Buchanan* v. *Angelone*, 522 U. S. 269, 277-278, n. 4 (1998). Compare *id.*, at 272, n.1, with J. A. 192-193. In addition, the trial judge in the present case did what Buchanan complained was not done in his case: "provide the jury with express guidance on the concept of mitigation . . . ." Compare 522 U. S., at 275, with J. A. 195. In oral argument, defense counsel told the jury, without objection, "you could still find that he meets both of these criterias [sic] [aggravating circumstances], and not sentence him to death." J. A. 212.

During deliberations, the jury asked the following written question:

> "If we believe that Lonnie Weeks, Jr., is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? or must we decide (even though he is guilty on one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule please clarify." J. A. 217 (underlines in original).

The trial judge notified counsel. J. A. 222. The judge indicated that a supplemental instruction would not improve on the original and that the best course was to refer the jury to the particular paragraph that answered their question. J. A. 223. After considering defense counsel's argument for a supplemental instruction, the judge reiterated his earlier conclusion. J. A. 223-224.

When the jury returned its verdict, the clerk read the form expressly stating that they had "considered the evidence in mitigation of the offense . . . ." J. A. 225. Upon request of defense counsel, each of the twelve jurors orally affirmed that was their verdict. J. A. 225-226.

SUMMARY OF ARGUMENT

In the guilt phase of criminal trials, the rule is well established that the trial judge has discretion to answer jury questions by referring them to correct, pertinent, previously given instructions. Mere reference would be an abuse of discretion where the instruction did not address the point on which the jury was confused, but that is not the case here. There is no justification for creating a different rule for the penalty phase of capital cases. Sentencing is subject to lesser procedural requirements than the guilt trial, not greater, even in capital cases.

This case is subject to the new 28 U. S. C. § 2254(d), and petitioner's claim should be evaluated under that standard. Petitioner does not seek to apply a general standard designed for applications to myriad factual situations; he seeks to create a crystallized rule of law applicable to a specific, recurring

situation. This would be a "new rule" under *Teague* v. *Lane*, and it is not "clearly established" under § 2254(d).

The question in this case should not be considered a constitutional question at all. *Furman* v. *Georgia* and its progeny should be limited to systemic defects which render a state's system as a whole capricious. The myriad issues that arise in a penalty trial conducted under a constitutional structure should be considered questions of state law.

ARGUMENT

Case law before the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") has established a regular order for the consideration of habeas claims. Issues which preclude a court from reaching the question should be considered first. See *Steel Co.* v. *Citizens for a Better Environment*, 523 U. S. 83, 94-95 (1998) (jurisdictional before nonjurisdictional); *Lambrix* v. *Singletary*, 520 U. S. 518, 524 (1997) (procedural default ordinarily before *Teague*). The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion), precluding the creation or application of new rules on habeas, should be considered next. See *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994) ("the court *must* apply *Teague* before considering the merits of the claim").

With the enactment of the AEDPA, Congress has added an additional limitation analogous to the law-of-the-case doctrine. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 953 (1998); Brief of the Criminal Justice Legal Foundation as *Amicus Curiae* in *Williams* v. *Taylor*, No. 98-8384, pp. 2-6 ("CJLF *Williams* Brief"). Although this rule proceeds on a different theoretical basis than *Teague*, it involves some of the same subsidiary questions, see CJLF *Williams* Brief 25-26, and it makes sense to consider it at the same step of the analysis as *Teague*.

This brief *amicus curiae* will not address the procedural default question. We will begin with the survey of the legal landscape which begins a *Teague* analysis, see *Bohlen*, *supra*, 510 U. S., at 390, and then proceed to application of *Teague* and AEDPA. Finally, we inquire whether these kinds of discretionary decisions by trial judges should really be considered constitutional issues at all.

I. The trial judge has the discretion to answer a jury question by referring them to a previously given, correct, pertinent instruction, under well-established practice.

When a jury asks a question that indicates at least one juror misunderstands the instructions, may a trial judge answer them by referring them to the specific paragraph of the specific instruction that correctly answers the question? Petitioner in this case asserts, in essence, that the Constitution establishes a *per se* rule that such a response is insufficient. Brief for Petitioner 19-20. Such a rule would not only be "new" and not "clearly established," see part III, *infra*, at 14-18, it would be contrary to the overwhelming weight of authority.

The *Teague* survey begins with Supreme Court case law. See *Caspari* v. *Bohlen*, 510 U. S. 383, 391-393 (1994). Cases in this area often quote the statement from *Bollenbach* v. *United States*, 326 U. S. 607, 612-613 (1946): "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Sweeping statements in opinions must always be considered in the context of the cases that produce them. The events in *Bollenbach* contrast sharply with the present case.

Bollenbach involved a conspiracy of theft, interstate transportation, and sale of securities. *Id.*, at 608. The defendant was clearly involved in the final sale. *Ibid.* That is, he was a "fence." *Id.*, at 611. He was not being tried for "fencing," though, but rather for the interstate transportation of the securities and conspiring to commit that offense. *Id.*, at 608.

The jury asked whether an act of conspiracy could be performed after the crime was committed. *Id.*, at 609. Unlike the present case, the judge did not refer them to earlier instructions but instead crafted a supplemental instruction, including a presumption that a person in possession of stolen property shortly after the theft in another state "was the thief and transported stolen property in interstate commerce." *Ibid.* *Bollenbach* is thus a case of a "palpably erroneous answer by the judge to the jury's inquiry," *id.*, at 611, and its language must be interpreted with this in mind.

Bollenbach does not say or imply that the judge may not answer the question by reference to correct, previously given instructions. That question was not presented by the facts of the case, and general statements in opinions should not be taken to answer questions not in issue. Those questions should be resolved later, in cases where they are actually presented. See *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399-400 (1821). No subsequent Supreme Court case answers the question.

Turning to state and circuit precedents, the cases are legion holding that, in this situation, the trial judge may either give a supplemental instruction or refer to the instruction already given, in the judge's discretion. The Supreme Court of New Hampshire's treatment of the issue in *State* v. *Dedrick*, 607 A. 2d 127 (1992) is typical. After noting that the court could have "engage[d] in further dialogue" with the jury, it held, "It is equally proper, however, to refer the jury to the complete and adequate instructions previously given." *Id.*, at 129.

Other decisions to the same effect include, among many others, *People* v. *Davis*, 10 Cal. 4th 463, 522, 896 P. 2d 119, 151 (1995), *Boothe* v. *People*, 814 P. 2d 372, 374-375 (Colo. 1991), *State* v. *Neujahr*, 540 N. W. 2d 566, 573 (Neb. 1995), *United States* v. *Smith*, 104 F. 3d 145, 148-149 (CA8 1991), and *United States* v. *Span*, 170 F. 3d 798, 802 (CA7 1999). Indeed, the trial judge is not even required to go as far as the judge in the present case did, by pinpointing the specific paragraph in the specific instruction that answered the question.

In *Span*, the trial judge merely provided a written copy of the entire set of instructions. *Span*, 170 F. 3d, at 802, and n. 2. The Court of Appeals held, "It was not necessary for the district judge to direct the jury to specific sections of the instructions . . . ." *Id.*, at 802.

"The [trial] court has considerable discretion in deciding whether to grant . . . a request [for additional instructions]." 2 C. Wright, Federal Practice and Procedure—Criminal § 502, p. 827 (2d ed. 1982). Appellate courts reviewing the exercise of this discretion must be ever mindful of the difficulty of the task. See *id.*, at 831 (quoting *United States* v. *Walker*, 575 F. 2d 209, 214 (CA9 1978)). Trial judges are understandably reluctant to deviate from standard instructions when those instructions "cover the bases." Time-tested instructions are more likely to accurately state the law than new ones crafted ad hoc. They are also less likely to be reversed by another court down the line, based on a perceived ambiguity which no one at the trial thought was there. As one frustrated trial judge put it, "Every time a judge opens his big mouth and tries to explain what an instruction means, he puts his foot in it and the Appellate Court promptly bites it off." *People* v. *Beardslee*, 53 Cal. 3d 68, 96, 806 P. 2d 1311, 1325 (1991).

The trial judge must, of course, exercise discretion. It is error to announce in advance that the judge will not deviate from the standard. See *id.*, at 97, 806 P. 2d, at 1326; see also Cal. Standards of Judicial Administration § 5. However, when the trial judge considers the matter and determines that the standard instruction is the best answer, that determination is entitled to broad deference.

There are, of course, some cases finding abuse of discretion in the failure to give a sufficient supplemental instruction.

These cases typically involve instructions which are deficient or do not answer the question.[2]

A prime example of an erroneous response to a jury question is *United States* v. *Nunez*, 889 F. 2d 1564 (CA6 1989). In a conspiracy case involving two defendants and a government agent, see *id.*, at 1566, the jury asked if an agreement between one defendant and the agent made a conspiracy. *Id.*, at 1567. The answer, under circuit precedent, was no. *Id.*, at 1569. "[T]he trial court repeated its earlier definition of a conspiracy," and added a supplemental instruction which merely referred to "two or more persons," without distinguishing government agents from others. *Id.*, at 1567-1568.

The Sixth Circuit recognized the general rule. "If the issue that is the subject of an inquiry has been fully covered in the court's instructions, a reference to or rereading of the instructions may suffice." *Id.*, at 1569. The problem in *Nunez* was that the predicate for this rule was not met. The problem of one of the "conspirators" being a government agent was not covered by the instruction. *Id.*, at 1568. *Nunez* is entirely different from the present case, in which the specific question is addressed by the standard instruction. *Buchanan* v. *Angelone*, 522 U. S. 269, 277-278, n. 4 (1998).

Nunez was followed in *United States* v. *Warren*, 984 F. 2d 325 (CA9 1993). The jury, pondering premeditation in a murder case, asked, "Is premeditated to 'hurt' the same as premeditated to 'kill'?" *Id.*, at 329. The standard instruction focused on the nature rather than the object of premeditation, and therefore did not answer the question. *Id.*, at 329-330, and n. 7.

A survey of the legal landscape in general criminal cases of the time Weeks' conviction and sentence became final reveals

2. An exception is *McDowell* v. *Calderon*, 130 F. 3d 833 (CA9 1997), discussed in part II, *infra*, which *amicus* believes to be wrongly decided.

several points. First, there was no Supreme Court case holding that reference to a correct, pertinent instruction was an inadequate response to a jury question. Second, the overwhelming, if not unanimous, weight of state and circuit authority was squarely to the contrary. Third, the cases holding that reference to a previously given instruction was insufficient in a particular case are distinguishable, in that the instruction did not directly address the question.

If the question involved the guilt phase of a noncapital case, this survey would be sufficient to dispose of the question, either under *Teague* or 28 U. S. C. § 2254(d). Because the Ninth Circuit in *McDowell*, *supra*, thought the Eighth Amendment cases made a difference, we proceed to that question.

II. Nothing in existing Eighth Amendment precedents alters the rule of the trial judge's discretion in these matters.

Calls to impose additional constitutional restrictions in capital cases are generally based "on the predicate that the *penalty* of death is qualitatively different from a *sentence* of imprisonment, however long." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion) (emphasis added). This predicate explains why the sentencing phase of a capital case requires more stringent safeguards than the *sentencing* phase of a noncapital case. It would also support a call for a more stringent safeguard in the guilt phase of capital versus noncapital cases. See, *e.g.*, *Beck* v. *Alabama*, 447 U. S. 625, 627 (1980). It does not explain or support what petitioner asks in the present case, however—a rule forbidding in the penalty phase of capital cases a practice overwhelmingly approved in the guilt phase of noncapital cases.

The point can be clearly seen by comparing the present case with *State* v. *Dedrick*, 607 A. 2d 127 (N.H. 1992). Dedrick was accused of murder and claimed self-defense. *Id.*, at 128.

Weeks is unquestionably guilty of capital murder. He gunned down Trooper Jose Cavazos in the performance of his duty without a shred of provocation, justification, or excuse. See *Weeks* v. *Commonwealth*, 450 S. E. 2d 379, 382-383 (Va. 1994). If Dedrick's jury misunderstood the law of self-defense, there was a danger that a man innocent of murder would go to prison for fifteen to thirty years. See 607 A. 2d, at 128. In the present case, the worst that could happen is that a guilty murderer, who chose to take the life of a peace officer for no reason, will receive a punishment within the range which the law prescribes for that offense, despite circumstances which some may believe call for leniency.

Which of these two cases presents a greater potential for injustice? Which of the two has the greater claim to safeguards for the defendant? Only the most fanatical opponents of capital punishment would answer with the present case. Yes, death is qualitatively different from imprisonment of any length, but so, too, is guilt versus innocence qualitatively different from *any* punishment, death included. The conviction and lengthy imprisonment of an innocent person is a vastly greater injustice than the execution of *any* person actually guilty of capital murder, regardless of mitigating circumstances.

This distinction is recognized in the cases defining the "fundamental miscarriage of justice" exception to the procedural default rule. The wrongful conviction of a person who is innocent of the crime is the greatest injustice and therefore has the lowest threshold to qualify for the exception. *Schlup* v. *Delo*, 513 U. S. 298, 325-326 (1995). A claim that the defendant, although guilty of murder, was not eligible for the death penalty stands on a lower footing and requires the claimant to meet a more rigorous standard. *Id.*, at 326, n. 44. A defendant eligible for the death penalty, even if claiming overwhelming mitigating circumstances, cannot claim the "fundamental miscarriage of justice" exception at all. See *Sawyer* v. *Whitley*, 505 U. S. 333, 347 (1992).

The same principle that underlies the three-tiered standard of the *Sawyer/Schlup* rule also applies to trial procedure. "Our recognition of the significant difference between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence is reflected in our decisions that permit reduced procedural protections at sentencing. See, *e.g.*, *Williams* v. *New York*, 337 U. S. 241 (1949)." *Schlup*, *supra*, 513 U. S., at 326, n. 44. This principle applies to capital cases as well as noncapital. *Schlup*, *Sawyer*, and *Williams* were all capital cases, and *Williams* expressly rejected a "death is different" argument. *Williams* v. *New York*, 337 U. S. 241, 251-252 (1949).

In terms of constitutional claims for procedural protections, then, the sentencing phase of a capital case stands on a middle ground between the guilt phase of any major felony case, capital or noncapital, and the sentencing phase of a noncapital case. Some guilt-phase protections are not extended to capital penalty proceedings. See, *e.g.*, *Walton* v. *Arizona*, 497 U. S. 639, 647 (1990) (jury trial). On the other hand, there are some protections given to defendants in the capital penalty phase which are given to defendants in the guilt phase of trials but not in noncapital sentencing proceedings. These include the protection against double jeopardy, see *Monge* v. *California*, 524 U. S. 721, 734 (1998), and a type of confrontation right. See *Gardner* v. *Florida*, 430 U. S. 349, 362 (1977) (disclosure and opportunity to deny or explain information in presentence investigation). There is no basis, however, to hold that a procedure which would be perfectly valid in determining guilt is somehow unconstitutional when employed in the sentencing

phase of a capital case.[3] That, in essence, is the rule petitioner seeks in this case.

Petitioner's proposed rule is said to follow from *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). See *McDowell* v. *Calderon*, 130 F. 3d 833, 841 (CA9 1997) ("*Bollenbach* is not driving this case; *Eddings* is."). With all due respect to the *McDowell* majority, they are the ones who are "off target." Cf. *ibid.* *Eddings* is a rule of substantive law, not a rule of trial procedure.

In *Eddings*, the trial judge, who was the sentencer, stated flatly that he believed he was precluded by law from considering a major component of the defendant's case in mitigation. 455 U. S., at 109. There is no doubt what the *Eddings* Court considered to be the jury trial equivalent of this situation: "In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence . . . ." *Id.*, at 114. *Eddings* says nothing at all about the issue in dispute in this case, *i.e.*, the scope of the trial judge's discretion in answering jury questions. See *McDowell*, 130 F. 3d, at 844 (Kozinski, J., dissenting).

McDowell, 130 F. 3d, at 840, also relies on *Mills* v. *Maryland*, 486 U. S. 367 (1988). *Mills* involved a verdict form which could be interpreted as excluding from consideration any mitigating evidence on which the jury could not agree unanimously. *Id.*, at 384. Yet the *McDowell* Court itself quotes the passage of *Mills* that distinguishes it: "That reasonable men might derive a meaning from the instructions given other than the proper meaning of the statute *is probable*." *McDowell*, 130 F. 3d, at 840 (quoting *Mills*, 486 U. S., at 377) (emphasis

3. *Turner* v. *Murray*, 476 U. S. 28 (1986) reached such a result, but a splintered opinion with no coherent rationale attributable to a majority, which *Turner* is, is ripe for reconsideration when the issue comes up again. See *Nichols* v. *United States*, 511 U. S. 738, 745-746 (1994). *Mu'Min* v. *Virginia*, 500 U. S. 415, 424 (1991) implies in dicta that the *Turner* rule might apply to the guilt trial as well.

added). The instruction at issue in *Mills* was not a correct instruction. It failed the probability test, subsequently clarified in *Boyde* v. *California*, 494 U. S. 370, 380 (1990).[4]

The essence of *McDowell*, and of petitioner's argument, is that the assessment of reasonable probability under *Boyde* must be reconsidered when the jury asks a question. What the question shows in the present case is that one or more jurors, but *not* the jury as a whole, did not understand the role of mitigation on the first reading. As a matter of common experience, even the clearest instructions may be misunderstood by some of the people some of the time, particularly when they are included in a long list of instructions for a complex task. Every parent who has ever assembled a bicycle on a holiday eve knows this. It is also a matter of common experience that the misunderstanding can often be corrected by pointing out the specific passage that answers the question. The trial judge believed that procedure would be effective in this case, and the postverdict poll of the jury confirms he was correct.

Given the rule in the guilt phase of criminal trials generally that the trial judge has the discretion to refer the jury to the previous, correct, pertinent instruction, the question reduces to whether the Eighth Amendment establishes a different rule for the penalty phase of capital cases. On direct appeal, a strong argument could be made for a negative answer, based on the principle that the sentencing phase allows the trial judge greater leeway, not less. See *supra*, at 9-12. As this case arises on federal habeas corpus, though, two other and even more straightforward questions arise: (1) was a positive answer dictated by precedent binding on the state court at the time Weeks' sentence became final; and (2) was the state court's negative answer "contrary to . . . clearly established Federal

4. To the extent *Mills* used other standards, see *id.*, at 379, it was effectively overruled in *Boyde*. See *Estelle* v. *McGuire*, 502 U. S. 62, 72-73, n. 4 (1991) (expressly disapproving language in two other cases inconsistent with *Boyde*).

law, as determined by" this Court? 28 U. S. C. § 2254(d)(1). In the context of the question presented in this case, these questions are substantially the same, and the answer to both is no.

III. Petitioner's proposed rule is neither "dictated by precedent" nor "clearly established."

A. Applicability of the AEDPA.

Petitioner seeks reversal of a judgment holding that his claim is precluded by the new habeas statute, 28 U. S. C. § 2254(d) enacted as part of the landmark Antiterrorism and Effective Death Penalty Act ("AEDPA"), 110 Stat. 1218 (1996). See *Weeks* v. *Angelone*, 176 F. 3d 249, 257-258, 261 (CA4 1999). Astonishingly, he does not even cite, much less discuss, the statute in his brief. Oblique references to "de novo review" and the Virginia Supreme Court's supposedly "unreasonable" decision constitute the entirety of his AEDPA discussion. See Brief for Petitioner 17, n. 9, 25, n. 11.

Petitioner claims that the new standard is inapplicable because the Virginia Supreme Court's decision was "perfunctory." *Id.*, at 17, n. 9. Acceptance of this argument in this case would empower defendants to evade a major Act of Congress by the simple expedient of inadequate briefing.

The Virginia Supreme Court's discussion of this point was "perfunctory" for an entirely valid reason. Weeks' brief utterly failed to present an argument of any substance. The point in question was Assignment of Error 44. J. A. 253. The argument on this point merely incorporated the argument on another point. J. A. 270. That argument, in turn, merely recited the underlying rule of mitigation. J. A. 267. The brief is devoid of any discussion of the rule that the trial judge may refer to prior, correct instructions in response to a jury question, and it made no attempt to explain why that rule is inapplicable to the present case.

A strong argument can be made that the issue was not "fairly presented" to the state court and therefore is procedurally defaulted. See *Castille* v. *Peoples*, 489 U. S. 346, 351 (1989). Assuming *arguendo* that Weeks just barely met the threshold for fair presentation, his argument got the treatment it deserved. To write a full opinion on this point, the state court would have had to research the pertinent authorities through its own staff without the benefit of briefing. This is not a normal mode of operation for appellate courts.

Congress intended that the judgments of state courts be respected in the lower federal courts as the product of a coordinate, coequal branch of the American judicial system.[5] See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 953, 958 (1990); CJLF *Williams* Brief 7-8; *Sawyer* v. *Smith*, 497 U. S. 227, 241 (1990) ("coequal"). Congress could not conceivably have intended that this requirement could be defeated by hopelessly inadequate briefing on defendant's part or made dependent on extraordinary *sua sponte* legal research by state appellate courts.

The question of how to handle a state decision which ignores or summarily dismisses a fully developed argument can wait for a case which presents it. So, too, can the question of how to apply the "unreasonable application" requirement of § 2254(d)(1) to a summary decision. The present case is easily decided on the "clearly established" requirement.

---

5. AEDPA does not impair the authority of this Court to exercise plenary review of state decisions, although it does limit the vehicles for such review. That is, de novo review is limited to certiorari to state courts and not review of collateral attacks on state decisions in the lower federal courts. *Stone* v. *Powell*, 428 U. S. 465 (1976) placed the same limitation on Fourth Amendment exclusion cases 20 years earlier, and it has not materially impaired this Court's ability to shape that area of the law.

B. Rules and Applications.

The pre-AEDPA jurisprudence under *Teague* v. *Lane*, 489 U. S. 288 (1989) distinguished between new rules of law and applications of existing rules. New rules were subject to the *Teague* limitation, while applications of existing general standards to varying fact patterns were not. See, *e.g.*, *Thompson* v. *Keohane*, 516 U. S. 99, 106-107 (1995) (de novo relitigation of "mixed question of law and fact"). The distinction between the two was not always clear. See *Wright* v. *West*, 505 U. S. 277, 307 (1992) (Kennedy, J., concurring in the judgment).

In the statute, Congress has continued to treat law declaration and law application as separate concepts, although the difference in treatment is not as stark as under *Teague*. See CJLF *Williams* Brief 23; Scheidegger, *supra*, 98 Colum. L. Rev., at 959. The state court's decision stands unless it failed to apply the applicable, clearly established Supreme Court precedent ("contrary to") or unless, having applied the rule, it unreasonably applied it to the facts of the case. In either event, the rule must have been "clearly established," a term borrowed from *Sawyer*, *supra*, 497 U. S., at 236, which in turn borrowed it from the qualified immunity cases. If the rule petitioner asserts is not "clearly established," the case is over. A state decision cannot be contrary to or an unreasonable application of a nonexistent rule.

Petitioner in this case makes the same erroneous argument that this Court has rejected time and again in *Teague* cases. He asserts his rule at an excessive level of generality, a level that would render both *Teague* and § 2254(d)(1) meaningless. See *Sawyer*, *supra*, 497 U. S., at 236; *West*, *supra*, 505 U. S., at 311-313 (Souter, J., concurring in the judgment).

A comparison of *Sawyer* with *West* illustrates the point. *West* involved the sufficiency-of-evidence rule of *Jackson* v. *Virginia*, 443 U. S. 307, 324 (1979). This is a general standard, incapable of precise definition, which must necessarily be

applied case-by-case to myriad fact patterns. See *West*, *supra*, 505 U. S., at 308-309 (Kennedy, J., concurring in the judgment). *Sawyer* involved the rule of *Caldwell* v. *Mississippi*, 472 U. S. 320, 332-334 (1985) regarding prosecutors' reference to appeals in their closing arguments. *Caldwell* was a crystallized rule of law governing a specific legal question. Although it was derived from general Eighth Amendment principles, none of the constitutional precedents it relied on dealt with prosecutor arguments or telling the jury about appeals. See *Sawyer*, *supra*, 497 U. S., at 235. *Caldwell* was a new rule, not an application of existing rules. *Id.*, at 238.

The present case fits snugly into the mold of *Sawyer*. The *Lockett* line of cases established the rule of substantive law regarding what the sentencer must consider. These cases do not deal with the question of how to handle jury questions about correct instructions; they deal with invalid statutes or with incorrect instructions or equivalents. See *Lockett* v. *Ohio*, 438 U. S. 586, 607-608 (1978) (plurality opinion) (statute); *Eddings* v. *Oklahoma*, 455 U. S. 104, 114 (1982) (judge's error equivalent to incorrect instruction); *Mills* v. *Maryland*, 486 U. S. 367, 384 (1988) (incorrect instructions and forms).

The issue in this case, how much latitude a trial judge has in deciding how best to clear up a question which has arisen *despite* a correct instruction, is distinct from the rules governing what *is* a correct instruction. The creation of a constitutional rule limiting the judge's discretion would most assuredly plow new ground and impose a new burden on the states. Cf. *Teague*, *supra*, 489 U. S., at 301. Given the mountain of authority holding that the judge does have the discretion to answer jury questions in the manner employed in this case, it would be outlandish to assert that "in light of authority extant when [Weeks'] conviction became final, [the] unlawfulness [of the judge's response was] apparent." Cf. *Wright* v. *West*, *supra*, 505 U. S., at 313 (Souter, J., concurring in the judgment). Petitioner does not need a case with facts identical to his own, see *ibid.*, but he needs one addressing the same question of law.

He does not have one. The rule he seeks would be "new" under *Teague*, and it is not "clearly established" under 28 U. S. C. § 2254(d)(1). See *Neelley* v. *Nagle*, 138 F. 3d 917, 924-925 (CA11 1998) (similarity of "clearly established" to *Teague*); CJLF *Williams* Brief 19-20, 21-24. Petitioner's claim is precluded by both rules.[6]

IV. The trial judge's exercise of discretion on this point should not be considered a federal constitutional question.

Petitioner's contention that the Eighth Amendment governs the trial judge's exercise of discretion in this case raises the question of the extent of federal oversight of state courts. Is the Eighth Amendment going to permeate every last cranny of capital sentencing, so that *every* penalty phase claim automatically becomes a federal constitutional question? The case law has already traveled far down the road of inflating and devaluing the currency of the Eighth Amendment, and it is high time to ask if the Court should take the process any further.

In the general criminal law, it has long been settled that the Due Process Clause, fundamental fairness, and the cases implementing these requirements do not "establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority." *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967); *Parke* v. *Raley*, 506 U. S. 20, 28 (1992). The Eighth Amendment is one of those "specific provisions."

The Eighth Amendment would appear on its face to be a purely substantive requirement with no procedural component. One would think that a given punishment, at least for a given crime, is either "cruel and unusual" or it is not, regardless of the procedure by which it is imposed. Even so, *Furman* v. *Georgia*, 408 U. S. 238 (1972) struck down the then-existing capital

6. The narrow *Teague* exceptions are obviously inapplicable.

sentencing statutes on Eighth Amendment grounds, based on systemic, structural deficiencies which rendered the systems as a whole capricious. See *id.*, at 309-310 (Stewart, J., concurring in the judgment). The splintered opinion raised more questions than it answered, though, and it took many years to answer the major questions of what kind of sentencing systems would be valid. See generally Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95 (1987).

With the structure in place, attacks on capital sentences have changed from broadside to stiletto. Federal courts now routinely "peer majestically over the [state] court's shoulder," *Lewis* v. *Jeffers*, 497 U. S. 764, 780 (1990) (quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 450 (1980) (White, J., dissenting)), to scrutinize every detail of the penalty phase. Every piece of evidence, every phrase of argument, and every nuance of instructions are considered fair game.

The results of this micromanagement are often extremely doubtful. In *Rupe* v. *Wood*, 93 F. 3d 1434, 1440 (CA9 1996), a federal court threw out a death sentence because the state court had excluded a polygraph test which the examiner himself had declared unreliable. Cf. *United States* v. *Scheffer*, 523 U. S. 303, 317 (1998) (rule-making authority may categorically ban all polygraphs). In *Coleman* v. *Calderon*, 150 F. 3d 1105, 1118-1119 (CA9 1998), the same court overturned a judgment because the judge gave a commutation instruction of the type approved by this Court in *California* v. *Ramos*, 463 U. S. 992 (1983). The *Coleman* Court purported to distinguish *Ramos* on the ground that, in the individual case, the commutation power was not vested in the governor alone. 150 F. 3d, at 1119. This Court reversed on other grounds because it was not asked to review this ground, but the majority's skepticism of this ruling is evident. *Calderon* v. *Coleman*, 525 U. S. 141, 142 L. Ed. 2d 521, 527, 119 S. Ct. 500, 503 (1998).

What does all this relitigation accomplish? Does the reversal of an occasional death sentence based on a doubtful claim reasonably rejected by state courts make the capital

sentencing system less arbitrary, in the *Furman* sense? A strong argument can be made that such reversals make the system *more* arbitrary. On direct appeal, the state supreme court decides these questions with a reasonable uniformity, but on federal habeas the random assignment of individual district judges and three-judge appellate panels can bring widely varying approaches and attitudes to bear. A murderer's ultimate sentence should depend on what he did, not on which federal judges he draws.

The other effect of relitigating every detail over again in federal court is to drag out the proceedings for years. Extended delays severely impair the function of the death penalty. See *Lackey* v. *Texas*, 514 U. S. 1045, 1045-1046 (1995) (Stevens, J., respecting denial of certiorari); *Elledge* v. *Florida*, 142 L. Ed. 2d 303, 303, 119 S. Ct. 366, 367 (1998) (Breyer, J., dissenting from denial of certiorari). For the oldest cases, much of the problem was caused by high reversal rates, which were in turn caused in large part by the turmoil and uncertainty in the post-*Furman* capital punishment jurisprudence.[7] See *Lockett* v. *Ohio*, 438 U. S. 586, 622 (1978) (White, J., dissenting in part) ("about-face"); *id.*, at 629 (Rehnquist, J., dissenting) ("pillar to post"); *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting) ("annually improvised" jurisprudence). The era of capital jurisprudence lurching erratically from side to side is, hopefully, behind us. For cases entering the pipeline in the 1990s, the litigation is likely to involve the administration of established rules within a tested, constitutional structure.

---

7. Florida, for example, has twice suffered disapproval of practices used in large numbers of capital cases and reasonably believed to be consistent with, if not approved by, this Court's precedents. See K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform 21 (1995) (discussing *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987)); *Lambrix* v. *Singletary*, 520 U. S. 518, 537-538 (1997) (*Espinoza* v. *Florida*, 505 U. S. 1079 (1992) was contrary to suggestions in opinions as late as 1990).

The present case provides a prime example. To comply with the mandate of *Furman*, Virginia was required to narrow the death-eligible class with factors that meaningfully distinguish the potentially capital cases from the general pool of murders, and then it had to provide a vehicle for consideration of mitigating circumstances. See *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988). Virginia has done that. See Va. Code Ann. § 18.2-31 (narrowed definition of capital murder); § 19.2-264.2 (additional requirement of aggravating circumstance); § 19.2-264.4(B) (mitigation). It is not enough for legislatures and courts to declare this structure exists. The state must give the jurors instructions that convey to them the factors they must or may consider. See *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989) (instructions did not provide jury with vehicle to give effect to mitigating evidence). The state has done that with its standard instruction. *Buchanan* v. *Angelone*, 522 U. S. 269, 277-278, n. 4 (1998).

The systemic problems that gave rise to *Furman* have been corrected. The death penalty in Virginia is imposed through a structured system of tested, constitutional statutes and standard jury instructions. The murderers on death row are not a "capriciously selected random handful," cf. *Furman*, *supra*, 408 U. S., at 309-310 (Stewart, J., concurring in the judgment), but a carefully selected product of a well-structured system.

In conducting a trial, judges must make a myriad of judgment calls. Each ruling arguably has some impact on some constitutional right, if those rights are extended far enough. "All rights tend to declare themselves absolute to their logical extreme." *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908) (Holmes, J.). Courts must resist this tendency. Every jury issue can be cast as a Sixth Amendment question. Every evidence question can be cast as a confrontation question, a self-incrimination question, or, if all else fails, a due process question. Such pervasive federal control of state proceedings is contrary to the fundamental structure of our federal system.

This case involves the routine exercise of a trial judge's discretion of the type that comes up every day. The judge gives the jury a correct, tested, standard instruction. A question indicates that at least one juror has failed to understand. The judge must decide whether the issue is best clarified by pinpointing the answer in the previously given standard instructions or by crafting a custom-made supplemental instruction. The judge considers the alternatives and decides that pinpointing the answer is the better approach in this case. See J. A. 223-224.

The question is much too far removed from *Furman* to be considered an Eighth Amendment question. *Furman* and its progeny should be understood to address those issues that would render a state's capital sentencing system *as a whole* an arbitrary system rather than a structured system. The routine administration of that system in individual cases should be considered a matter of state law. Trial judges must have a certain amount of discretion for the system to work. When they abuse that discretion, the remedy is appeal to the state appellate courts.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit should be affirmed.

November, 1999

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation